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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900. 1902.

No. 353. 1902, 17.

THE LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 28, 1900.

(17,843.)

(17,843.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 358.

THE LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1900.

2 No. 2.

UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, thirty (30) days after the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville & Jeffersonville Ferry Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Hazelrigg, chief justice of the court of appeals of the State of Kentucky, this 14 day of July, A. D. 1900.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of the State of Kentucky.

3 I accept service for the Commonwealth July 17, 1900.

ROB'T J. BRECKINRIDGE,
Att'y General of Kentucky.

[Endorsed:] No. 2. L. & J. Ferry Co. *vs.* Commonwealth. Citation & copy. 1900, July 14, filed. Att.: S. J. Shackelford, C. C. A.

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 13th day of June, A. D. 1900, Chief Justice James H. Hazelrigg and Judges Thomas H. Paynter, A. R. Burnam, J. P. Hobson, B. L. D. Guffy, George Du Relle, & James D. White sitting.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } No. 2.

Be it remembered that heretofore, to wit, on the 30th day of December, A. D. 1898, the appellant, by its counsel, Humphrey & Davie, filed in the office of the clerk of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

Pleas before the Hon. James E. Cantrill, Judge of the Franklin Circuit Court, in Above Action.

Franklin Circuit Court.

Filed August 27, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY Company, Defendant.
} #22353. Petition Ordinary.

2 The plaintiff, The Commonwealth of Kentucky, states that on and before the 15th day of September, 1893, the defendant, Louisville & Jeffersonville Ferry Company, was a corporation, organized and doing business under the laws of plaintiff, having and exercising privileges and franchises not allowed by law to natural persons, and as such corporation continued to exercise such privileges and franchises up to and including the time of the filing of this suit; that on the — day of ——, 189–, said defendant, through its superintendent & secretary, E. L. Dorsey, made and delivered to plaintiff's auditor of public accounts a statement, as of date September 15th, 1893, verified by said superintendent & secretary, as required by law, and showing the facts upon which, according to law, was to be based the valuation of defendant's franchise for taxation for the year 1894; says that by the law the plaintiff's said auditor of public accounts, its treasurer, and secretary of state are made and constituted a board of valuation and assessment, for the purpose, among other things, of fixing the value of corporate franchises for taxation under the laws of plaintiff. Said statement of defendant was, on the 12th day of March, 1898, laid before a majority, constituting a quorum to do business, of said board of valuation and assessment, and said board, having been duly qualified to discharge their duties as such, proceeded to value and assess the corporate franchise of said defendant within plaintiff's territorial limits and fixed its franchise value for assessment and taxation for the year 1894 at more than $66,886.00. A statement of said assessment and valuation was thereupon returned to the auditor of public accounts,

3 who, on the 12th day of March, 1898, notified said defendant of said assessment and valuation, the amount thereof, and the taxes due thereon. Within thirty days from the giving of said notice the defendant appeared before said board and asked a reduction of the said valuation, and introduced evidence in support of its contentions, and had a full and fair hearing before said board. After said hearing the matter was again submitted to the board, which board thereupon proceeded to and did fix, finally, the value of the corporate franchise within plaintiff's territorial limits for the year 1894 at $66,886.00. A statement of said assessment and valuation was thereupon returned to the auditor, who thereafter, on the 10th day of June, 1898, notified the defendant of said

final assessment and valuation, the amount thereof, and the taxes thereon due plaintiff for said year; which taxes amounted to $284.28, the tax rate as provided by law of plaintiff for said year being 42½ cents on each one hundred dollars' worth of taxable property within its territorial limits. Itemized statement showing said last-named valuation and taxes due thereon is filed herewith, marked "A." After the giving of said last-named notice the defendant failed to further protest or object to said valuation and assessment and same became final and binding. The said taxes were due and payable to plaintiff's treasurer, at his office in Frankfort, Franklin county, Kentucky, on or before the 10th day of July, 1898, but the defendant has failed and refused to pay same or any part thereof, nor has any part of same ever been paid; and the defendant, having failed to pay said taxes or any part thereof after receiving thirty days' notice of said valuation and assessment, as aforesaid, therefore became indebted and liable to plaintiff in the further sum of $28.42, the ten per cent penalty on said taxes as provided by law on
4 account of such delinquencies. Plaintiff is entitled to interest on said taxes from the date same were due, at the rate of ten per cent. per annum, until paid.

The plaintiff further says that by reason of the defendant's failure to pay said taxes, interest, and penalty, as hereinbefore set out, the said defendant became delinquent on the 11th day of July, 1898, and so continued ever since, all as aforesaid, and guilty of a misdemeanor committed in Franklin county, Kentucky, and is therefore liable and indebted to the plaintiff in the further sum of $50.00 per day for each day during the period of said delinquency. Said delinquency has continued for more than 46 days, and the defendant is therefore indebted to plaintiff in the further sum of $2,300.00.

Wherefore plaintiff prays judgment against the defendant for $284.28 in taxes, with interest thereon, at the rate of ten per cent. per annum, from the date of maturity until paid, and for $28.42, the ten per cent. penalty on said taxes, and for the sum of $2,300.00, the $50.00 per day penalty for 46 days, and for its costs and all proper relief.

W. S. TAYLOR,
Attorney General.
M. H. THATCHER, *Of Counsel.*

5 *Tax Statement.*

"A."

Corporations.

State of Kentucky, office auditor public accounts.

FRANKFORT, *Aug. 20th*, 1898.

Louisville & Jeffersonville Ferry Co., Louisville, Ky., Dr., to State of Kentucky.

Report as of September 15th, 1893, to Taxes 1894.

Total capital	$121,050.00
Tangible property	54,164.00
Total valuation	$66,886.00
At 42½ on each $100:	
Amount of tax	$284.28

1st notice sent March 12th, 1898.
2nd " " June 10th, 1898.

6 Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KY.
v.
LOUISVILLE & JEFFERSONVILLE FERRY CO. } # 22352.

SAME
v.
SAME. } # 22353.

SAME
v.
SAME. } # 22354.

SAME
v.
SAME. } # 22355.

SAME
v.
SAME. } # 22356.

SAME
v.
SAME. } # 22357.

} Order.

On motion of attorney for plaintiff in each of the above-styled causes, ordered that plaintiff's claim for a penalty of fifty dollars per day in each case be dismissed without prejudice.

Thereupon came defendant in each of said causes and tendered their answers, which are ordered to be filed.

Then came plaintiff and tendered a demurrer in each of said cases to said answers, which are ordered to be filed, and said causes are now each submitted on demurrer.

Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY CO., Defendant.
} Answer. #22353.

The defendant, The Louisville and Jeffersonville Ferry Company, in answer to the petition herein, says that it denies that it is indebted to the plaintiff in the sum of $284.28, or 10 per cent. thereon, or any penalty or any part of either of said sums, for that the defendant says:

(1.) There was no power or authority in the board of valuation and assessment to make the assessment upon which the tax sued for is based at the time it made the same, the time having passed in which the said board had any right to make such assessment.

This defendant further says that all of its tangible property in Kentucky was assessed by the assessor of Jefferson county in the fall of 1893 for the State tax for the year 1894, and the defendant paid the said tax. The property so assessed by the sheriff of Jefferson county consisted of all of the boats and other personal property of this defendant, the defendant having no real estate in this State.

For the same year all of the real estate owned by this defendant in Indiana was assessed by the authorities of that State, and the defendant paid the tax thereon.

The defendant had no intangible property except the franchise hereinafter described.

The board of valuation and assessment ascertained what had been the net earnings of the defendant up to September 15th, 1893, for the year preceding that date. It then capitalized said net earnings at 6 per cent.—that is, to have been such an amount as at 6 per cent. would produce the sum of $121,050.00. From this the board deducted $54,164.00, being the assessed value of the defendant's property in Kentucky and Indiana, leaving the sum of $66,886.00 as the value of defendant's franchise.

This defendant says that it is a ferry company engaged in the transportation of passengers and freight between Louisville, Kentucky, and Jeffersonville, Indiana, and other points in Indiana; that substantially its whole revenue is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce—that is, from the carriage of persons and property between the States of Indiana and Kentucky.

Defendant states that in 1802 William Henry Harrison, then governor and commander-in-chief of the Indiana Territory, made a grant or license to Marsden G. Clark for a ferry, thereby granting to him a license to keep a ferry at Jeffersonville, in the county of Clark, Territory of Indiana, for the transportation of passengers, carriages, horses, and cattle across the Ohio river at said place.

In the year 1820 an act was passed by the Indiana legislature reciting that one George White, of Jeffersonville, in the county of Clark and State of Indiana, had purchased a certain ferry from one Samuel Meriwether, and thereupon it was enacted by the said General Assembly of the State of Indiana as follows:

That the said George White be, and he is hereby and hereafter, authorized to keep a ferry in said town of Jeffersonville and to ferry off and from any portion of the public grant or commons in said town lying along or bordering upon the Ohio river across
9 the said river to the opposite shore or mouth of Bear Grass creek.

The mouth of Bear Grass creek mentioned in this act was at that time and still is within the corporate limits of the city of Louisville and within 150 or 200 yards from where this defendant now lands its ferry-boats in the State of Kentucky.

In the year 1802 William Henry Harrison, governor and commander-in-chief of the Indiana Territory, granted to Joseph Bowman a license to keep a ferry from the landing near the spring in the town of Jeffersonville across the Ohio river to the public road at the mouth of Bear Grass creek, on the said Joseph Bowman engaging to keep good and sufficient boats at all lawful hours for the passage of all travelers with their wagons, carts, carriages, horses, etc.

The defendant says that these three ferry franchises by regular devolution of title, sometimes by inheritance and sometimes by conveyances duly reported, came to be owned in the year 1865 by John Shallcross, Moses Brown, Hiram Mayberry, James Wathen, A. Wathen, Charles Woolfolk & Co., J. B. Smith, W. C. Hite, E. S. Hoffman, P. Varble, and Daniel Park, and during all these years ferries had been maintained, all the three franchises having, about the year 1837, vested in A. Wathen, Charles Strader, John Shallcross, and James Thompson, under whom the persons just above named derived their title through sundry mesne conveyances.

Under date of March 29, 1865, the persons then the owners of the ferry associated themselves in a partnership for the purpose
10 of operating the same and continued to operate it until on the 29th day of March, 1869, the legislature of the State of Kentucky passed an act entitled "An act to incorporate the Louisville & Jeffersonville Ferry Company," which is this defendant.

By the seventh clause of said act it is provided that said corporation may purchase from any existing ferry company or associations any ferry, boats, wharves, and ferry franchises from any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said States.

By the eighth clause it was provided that said corporation may

accept such boats and franchises and wharves and other property in payment of stock subscribed and at such prices as may be agreed upon.

Under this act the defendant's corporate organization was perfected and it procured to be conveyed to itself the above-mentioned ferry, franchises, with the boats then owned by the partnership, and issued therefor its fully paid capital stock for $200,000. The boats and personal property so acquired were of no great value, the principal worth consisting in the franchises so acquired as above.

The boats now owned by it and also the boats which were owned by it in the year 1893 were regularly enrolled, under the laws of the United States, at the port of Louisville and were assessed, as above stated, by the sheriff of Jefferson county, in the fall of that year, and the tax paid upon them in the year 1894.

This defendant, in the year 1887, made a contract with the
11 sinking-fund commissioners of the city of Louisville, a corporation having charge of certain fiscal affairs of the said city, under which the defendant leased the ferry privileges in said city, and agreed to pay for the ferry privileges and taxes $800 a year and a wharfage fee annually of $400. This contract, by its terms, will expire January 1, 1902.

The defendant says that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana.

The defendant says it brought before the board of valuation and assessment, before that board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said board making any valuation whatever of its capital stock because all of its property had been once assessed and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said board refused to enter into the question of the valuation of the said franchise granted by the State of Indiana, as aforesaid, and owned
12 and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce.

The defendant says that the State board of valuation and assessment in making the assessment sued on has disregarded the Constitution of the United States, and especially the clause giving to Congress the power to regulate commerce between the States, and has also disregarded the Constitution of the United States, and particularly the fourteenth amendment, in that it has included in its

assessment for Kentucky taxation franchises derived from the State of Indiana and there exercised.

The defendant says that the said board of valuation persisted, as above stated, in taking the net earnings of this defendant, capitalizing these earnings at six per cent. and fixing the value of its capital stock at this sum, and only deducting therefrom the value of its tangible property as assessed in Kentucky and Indiana; all of which is contrary to law and right and in violation of the Constitution of the United States and the laws passed in pursuance thereof, and the said assessment is therefore illegal and void.

Wherefore defendant prays that the petition may be herein dismissed, and for all proper relief.

HUMPHREY & DAVIE,
For Defendant.

Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
13 LOUISVILLE & JEFFERSONVILLE FERRY Co., Defendant. } # 22353. Demurrer.

Plaintiff demurs to the answer of defendant, because same does not state facts sufficient to constitute a defense, and prays the judgment of the court.

W. S. TAYLOR,
Att'y General.

Franklin Circuit Court, September 21st, 1898.

SAME, Plaintiff,
vs.
SAME, Defendant. } # 22353. Order.

Ordered that this cause be assigned for next Friday (16th day of term) for hearing on demurrer to answer.

Franklin Circuit Court, October 1st, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY Company, Defendant. } # 22353. Judgment.

This cause having been submitted on demurrer to answer herein, and the court, being sufficiently advised thereon, orders that
14 same be sustained, with leave to defendant to amend; to which ruling of the court in sustaining the demurrer the defendant excepts.

Thereupon the defendant asked leave to amend his answer by

the insertion of these words, "The defendant had no intangible property except the franchises hereinafter described," immediately preceding the expression "the board of valuation and assessment," in the second paragraph of first page of answer. The plaintiff assenting thereto, such leave is given and such amendment made.

Then plaintiff renewed its demurrer to the answer as amended, and the court, being advised thereon, orders that same again be sustained; to which ruling of the court the defendant excepts.

Thereupon, the defendant declining to further plead, and the cause being submitted, and the court being sufficiently advised, it is adjudged that the plaintiff, The Commonwealth of Kentucky, recover of the defendant, Louisville and Jeffersonville Ferry Company, the sum of two hundred eighty-four $\frac{28}{100}$ dollars ($284.28), with ten per cent. interest per annum thereon from the 10th day of July, 1898, until paid, and the further sum of twenty-eight and $\frac{42}{100}$ dollars ($28.42), being the ten per cent. penalty on said taxes on account of delinquency, as set out in the petition; also recover its costs herein expended.

To all of which the defendant excepts and objects, and prays an appeal to the court of appeals, which is granted.

15 *Supersedeas Bond.*

THE COMMONWEALTH OF KENTUCKY:

Franklin Circuit Court.

LOUISVILLE & JEFFERSONVILLE FERRY CO., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } No. 22353.

Upon an appeal from a judgment of the Franklin circuit court rendered 1st day of October, 1898.

Whereas said appellant, Louisville & Jeffersonville Ferry Co., took an appeal from the judgment of the Franklin circuit court, rendered at its September term, 1898, against said company in favor of the appellee for the sum of ($284.28), two hundred and eighty-four & $\frac{28}{100}$ dollars, with interest, at 10 per cent., from 10th July, 1898, and the further sum of ($28.42), twenty-eight & $\frac{42}{100}$ dollars (ten per cent. penalty on same), and the appellant desires to supersede the collection of the said judgment above mentioned:

Now we, W. W. Hite, surety, do hereby covenant to and with the appellee, Commonwealth of Kentucky, that the appellant will pay the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the aforesaid judgment above stated in case it shall be affirmed and any judgment or order which the court of appeals may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment aforesaid, and also pay all rents, hire, or damage which during the pendency of the appeal

may accrue on any part of the property of which the appellee
16 is kept out of possession by reason of the appeal.
Witness our hands this 8th day of December, 1898.

LOUISVILLE & JEFFERSONVILLE
FERRY CO.,
By W. W. HITE, *President.*
W. W. HITE.

Attest: THOS. B. FORD, *C. F. C. C.*

STATE OF KENTUCKY, }
County of Franklin, } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing 14 pages contain a true and complete transcript of the case of The Commonwealth of Kentucky, plaintiff, *vs.* Louisville and Jeffersonville Ferry Company, defendant, # 22353, as appears from the records of the Franklin circuit court.

Witness my hand as clerk of said court this 15th day of December, 1898.

THOS. B. FORD, *C. F. C. C.*,
By J. R. ELLIOTT, *D. C.*

The following statement was endorsed on said transcript:

The appeal is from the judgment on page 13 of this transcript rendered Oct. 1st, 1898.

17 Afterwards, at a court of appeals held, as aforesaid, on May 23, 1899, the following order was entered:

LOUISVILLE & JEFFERSONVILLE FERRY CO. *vs.* COMMONWEALTH OF KENTUCKY. } Franklin.

Ordered that this cause be submitted.

Afterwards, at a court of appeals held, as aforesaid, on the 13th day of June, A. D. 1900, the following judgment was entered herein:

LOUISVILLE & JEFFERSONVILLE FERRY Company, Appellant, *vs.* COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from a Judgment of the Franklin Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

On the same day said court, through Judge Paynter, delivered the following opinion:

18 Court of Appeals of Kentucky, June 13, 1900.

LOUISVILLE & JEFFERSONVILLE FERRY CO., Appellant, vs. COMMONWEALTH OF KENTUCKY, Appellee. } No. 2.

SAME, Appellant, v. SAME, Appellee. } No. 3.

SAME, Appellant, v. SAME, Appellee. } No. 4.

SAME, Appellant, v. SAME, Appellee. } No. 5.

SAME, Appellant, v. SAME, Appellee. } No. 6.

Appeal from Franklin circuit court.

Opinion of the Court, by Paynter, J.

The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the legislature passed in 1869. It purchased a ferry franchise, which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry busi-
19 ness across the Ohio river from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the sinking-fund commissioners of the city of Louisville title to the ferry rights along the Ohio river within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry-boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The board of valuation and assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on ac-

count of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

On behalf of appellant it is urged (1) that the franchises belonging to the corporation derived by it from the State of Indiana is an incorporeal hereditament, whose location is in the State of Indiana and which cannot be taxed by the State of Kentucky, nor can its value be included in any tax *in* which the State of Kentucky endeavors to exact from it; (2) that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; (3) that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not subject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; (4) that the assessments not having been made within the years during which the taxes were due and payable, the board of valuation and assessment could not make the assessment—in other words, has no right to retrospectively assess.

We will consider the first and second objections together. We deem it unnecessary to enter into a consideration as to the meaning of the eleventh article of the compact with Virginia. It is sufficient to say that in Newport, &c., *v.* Taylor's Ex'rs, 16 Ben Mon., 784, and Reeves *v.* Little, 7 Bush., 469, this court has held that the State of Kentucky has the right to grant a ferry franchise for the transportation of persons and property to the States on the northern side of the Ohio river, and that she has never attempted to exercise the right to grant a ferry franchise for the transportation of persons or property from northern shore of the Ohio river to the Kentucky shore, but the statutes of Kentucky only attempted to regulate the transportation of persons and property from this State's northern boundary to the opposite shore of the Ohio river. From our view of the question here involved, it is unnecessary to enter into a consideration of the question as to the right which the State of Kentucky might exercise in the matter of regulating transportation of persons and property across the Ohio river from its northern to its southern shore. The appellant is a Kentucky corporation. The board of valuation and assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river; but under certain sections of the Kentucky statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible *or* intangible, which it owned in the State of Indiana.

By virtue of its corporate authority the appellant acquired ferry-boats, the ferry rights, within the city of Louisville, which included the right to transport persons and property from Kentucky to In-

diana over the Ohio river, and the necessary use of its wharf to carry on that business. It also by contract (which its charter seems to have authorized it to do) acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from Indiana to Kentucky over the Ohio river. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property and having profitably used it, its corporate franchise presumably became of the value fixed by the board
22 of valuation and assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now exists in Kentucky.

We do not think the case of Henderson Bridge Co. *v.* Commonwealth, 99 Ky., 623, is in conflict with the views here expressed. There the Commonwealth only attempted to tax its franchise to low-water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana and presumably held and operated by virtue of it.

There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property.

The Supreme Court, in Gloucester Ferry Company *v.* Pennsylvania, 114 U. S., 206, said: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as
23 the property of corporations engaged in other business, is subject to State taxation, provided, always, it be within the jurisdiction of the State."

In Morgan *v.* Parham, 16 Wall., 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a regular line of steamers between Mobile, in that State, and New Orleans, in Louisiana. In that case the court said: "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value."

If the State was attempting to impose a tax upon the gross receipts or revenues of the appellant it might be plausibly argued that it was a tax imposed upon interstate commerce, for it was held in Philadelphia and Southern Steamship Company *v.* Pennsylvania, 122 U. S., 326, that a State tax upon the gross receipts of the steamship company incorporated under its laws which are derived from the transportation of persons and property by sea between different States is a regulation of interstate commerce in conflict with the exclusive powers of Congress under the Constitution, but the court (345) said: "The corporate franchises, the property, the business,
* the income of corporations created by a State may undoubt-
24 edly be taxed by the State; but in imposing such taxes care
should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government."

In Henderson Bridge Company *v.* Kentucky, 166 U. S., 154, the court said: "The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in Erie Railroad *v.* Pennsylvania, 158 U. S., 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.'"

The appellant is domiciled in Kentucky and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income, or revenue, but its income is alone considered in fixing the value of its franchise. The board of valuation and assessment has the right to make retrospective assessments. Section 4090, Kentucky Statutes, reads as follows: "Should any corporation fail to make the reports
* as required herein on or before the first day of October of
25 each year, the said board shall proceed to ascertain the facts
and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly." By this section, if the reports are not made within the time prescribed by law, the board may proceed to ascertain the facts and values as required by the article, and in our opinion it was intended by this section that they should exercise this power at any time. Besides, section 4077 provides that the auditor may call the board of valuation and assessment together from time to time as the business of the board may require. This indicates that they may have meetings at any time to discharge the duty imposed upon them by law, among which is the duty of assess-

ing franchises when no reports are made. Section 4241 imposes a duty upon the sheriff and auditor's agent, but does not interfere with the power of the board to make the assessments as in this case. If they fail to do so and the sheriff or auditor's agent should attempt to have the assessment made, then the question would arise as to their authority to do so. Until such question arises we forbear to express an opinion on it.

The judgments are affirmed.

25a Afterwards, on the — day of July, 1900, the appellant, by its counsel, filed in the clerk's office of said court of appeals its writ of error, as follows (a copy of which is retained and on file in said clerk's office):

26 No. 2.

UNITED STATES OF AMERICA, *District of Kentucky, Sixth Judicial Circuit,* } ss:

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals *court*, before you or some of you, between The Louisville & Jeffersonville Ferry Company, a corporation, as appellant, and The Commonwealth of Kentucky, as appellee, a manifest error hath happened, to the great damage of the said Louisville & Jeffersonville Ferry Company, as by its complaint appears, and wherein it is claimed its certain rights and privileges under the Constitution of the United States were decided against by your said court, and that your said court decided in favor of a certain authority exercised under the State of Kentucky, and which said authority and the exercise thereof were repugnant to the Constitution of the United States, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the* 13 day of August next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

United States, the 14 day of July, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fifth.

THOS. SPEED,
Clerk of the Circuit Court of the United States, Kentucky District.
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
JAMES H. HAZELRIGG,
Chief Justice of Court of Appeals of Kentucky.

---

*Not exceeding 30 days from the day of signing the citation.

[Endorsed:] 1900, July 14, filed. Att.: S. J. Shackelford, C. C. A.

27 On the same day the appellant and plaintiff in error filed in said clerk's office its bond and power of attorney to surety to sign same; which bond and power are in words and figures following, to wit:

Court of Appeals of Kentucky.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents that we, The Louisville & Jeffersonville Ferry Company, a corporation organized and existing under the laws of the State of Kentucky, as principal, and W. W. Hite, by Alex. P. Humphrey, his attorney-in-fact, as surety, are held and firmly bound unto the Commonwealth of Kentucky, its successors and assigns, in the sum of one thousand dollars; for the payment of which, well and truly to be made, we, The Louisville & Jeffersonville Ferry Company, for itself, its successors and assigns, and the said W. W. Hite, his heirs, executors, and administrators, bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this July 14, 1900.

The condition of this obligation is such that whereas the said Commonwealth of Kentucky instituted a certain action against the said Louisville & Jeffersonville Ferry Company in the Franklin circuit court, claiming a certain sum of money, and obtained
28 judgment therefor, and subsequently an appeal was taken from the said judgment to the court of appeals of Kentucky, which affirmed the same; and whereas the said Louisville & Jeffersonville Ferry Company has sued out a writ of error from the Supreme Court of the United States to reverse the said judgment of the court of appeals of Kentucky:

Now, therefore, if the above-bounden Louisville & Jeffersonville Ferry Company shall *procure* said writ of error to affect and answer all damages and costs if it fail to make good its appeal, then this obligation shall be void; otherwise remain in full force and effect.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY,
By ALEX. P. HUMPHREY, *Attorney.*
W. W. HITE, *Surety,*
By ALEX. P. HUMPHREY,
Attorney-in-fact.

The above and foregoing bond is approved this 14 day of July, 1900.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

(NOTE.—The power of attorney is copied in Record No. 1, same style as this case and heard with it.)

29 On the same day the appellant and plaintiff in error filed in said clerk's office the following assignment- of error:

In the Supreme Court of the United States.

LOUISVILLE & JEFFERSONVILLE FERRY CO., a Corporation, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Writ of error to the court of appeals of the State of Kentucky.

Assignments of Error.

The plaintiff in error, The Louisville & Jeffersonville Ferry Company, by Alexander Pope Humphrey, its attorney, this 14th day of July, 1900, shows that in the record of proceedings in the above-entitled cause there is manifest error in this, to wit:

1. The said court of appeals of Kentucky erred in deciding that the board of valuation and assessment had the right to consider as part of the property or as entering into the value of the franchise of the plaintiff in error its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

2. The court of appeals of Kentucky erred in deciding that
30 the law under which the board of valuation and assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which has been conveyed to it and which it owned for operating a ferry from the State of Indiana to the State of Kentucky.

3. The said court of appeals of Kentucky erred in deciding that the board of valuation and assessment had the right, in fixing the value of the capital stock of the plaintiff or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting

persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

4. The court of appeals of Kentucky erred in deciding that the board of valuation and assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

5. The court of appeals of Kentucky erred in failing to hold that the board of valuation and assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the fourteenth amendment thereof, and did not deprive the plaintiff in error of its property without due process of law.

6. The said court of appeals of Kentucky erred in rendering judgment in said cause in favor of the defendant in error and against the plaintiff in error.

Wherefore the plaintiff in error, The Louisville & Jeffersonville Ferry Company, prays that the judgment of the said court of
31 appeals of Kentucky may be reversed by this honorable court and this cause remanded to the said court of appeals of Kentucky, with directions to send down its mandate to Franklin circuit court, directing it to dismiss the petition against the plaintiff in error.

ALEX. POPE HUMPHREY.

COMMONWEALTH OF KENTUCKY, *sct:*

Court of Appeals.

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the preceding 30 pages contain a true, full, and complete transcript of the record and proceedings had in the case of Louisville & Jeffersonville Ferry Company, appellant, *vs.* The Commonwealth of Kentucky, appellee, upon appeal from a judgment of the Franklin circuit court, together with the original citation and writ of error and copies of the bond and assignment of error, as the same appear of record and on file in my office.

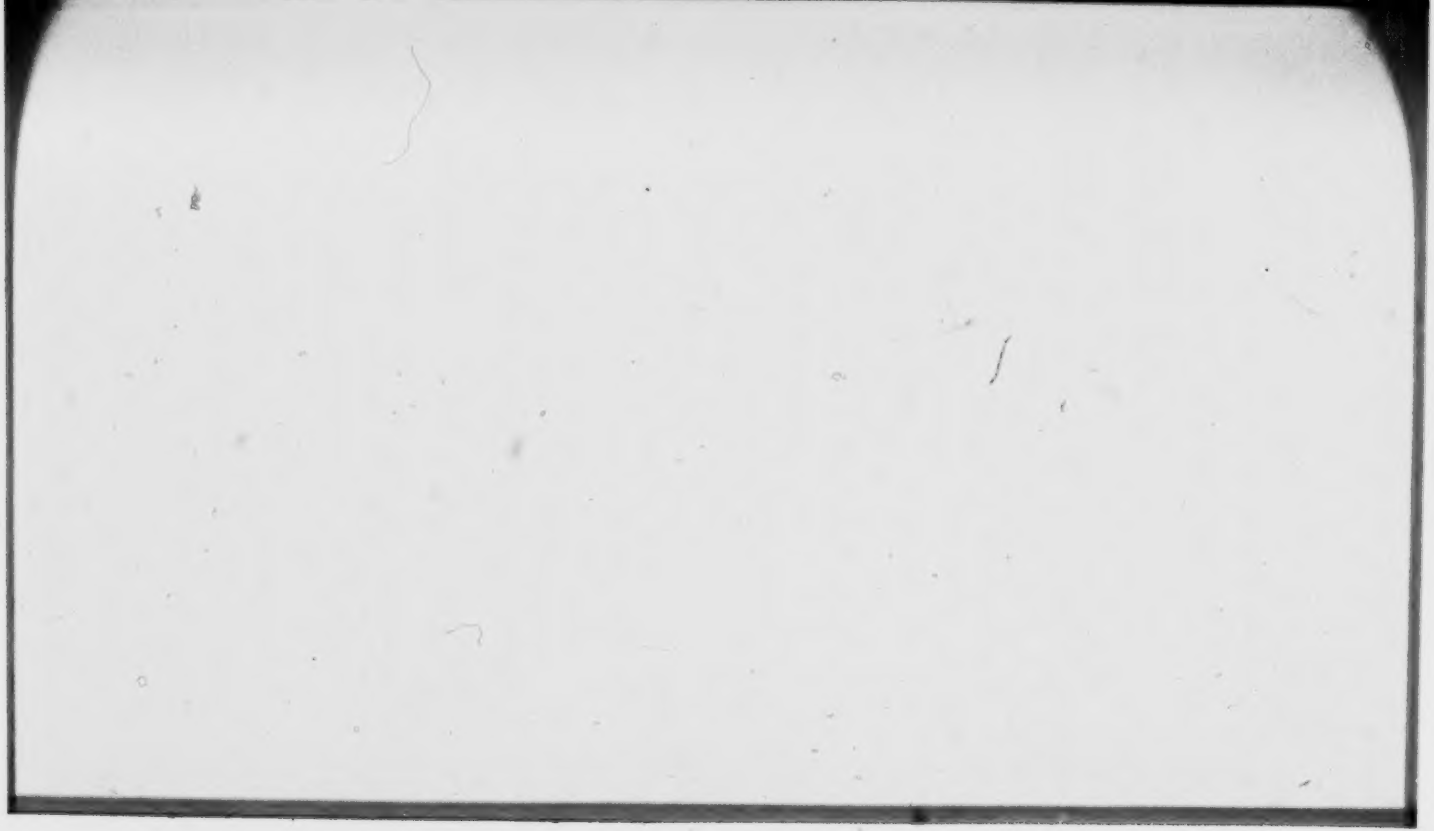
Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 19th day of July, A. D. 1900.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $9.50.

Endorsed on cover: File No., 17,843. Kentucky court of appeals. Term No., 358. The Louisville and Jeffersonville Ferry Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 28, 1900.



No. 173. 113

FILED
JAN 13 1902
JAMES H. McKENNEY,
Clerk

By. of Humphrey for P. C.

Supreme Court of the United States.

Filed Jan. 13, 1902.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, - - - - - - - - - *Plaintiff in Error,*

VERSUS

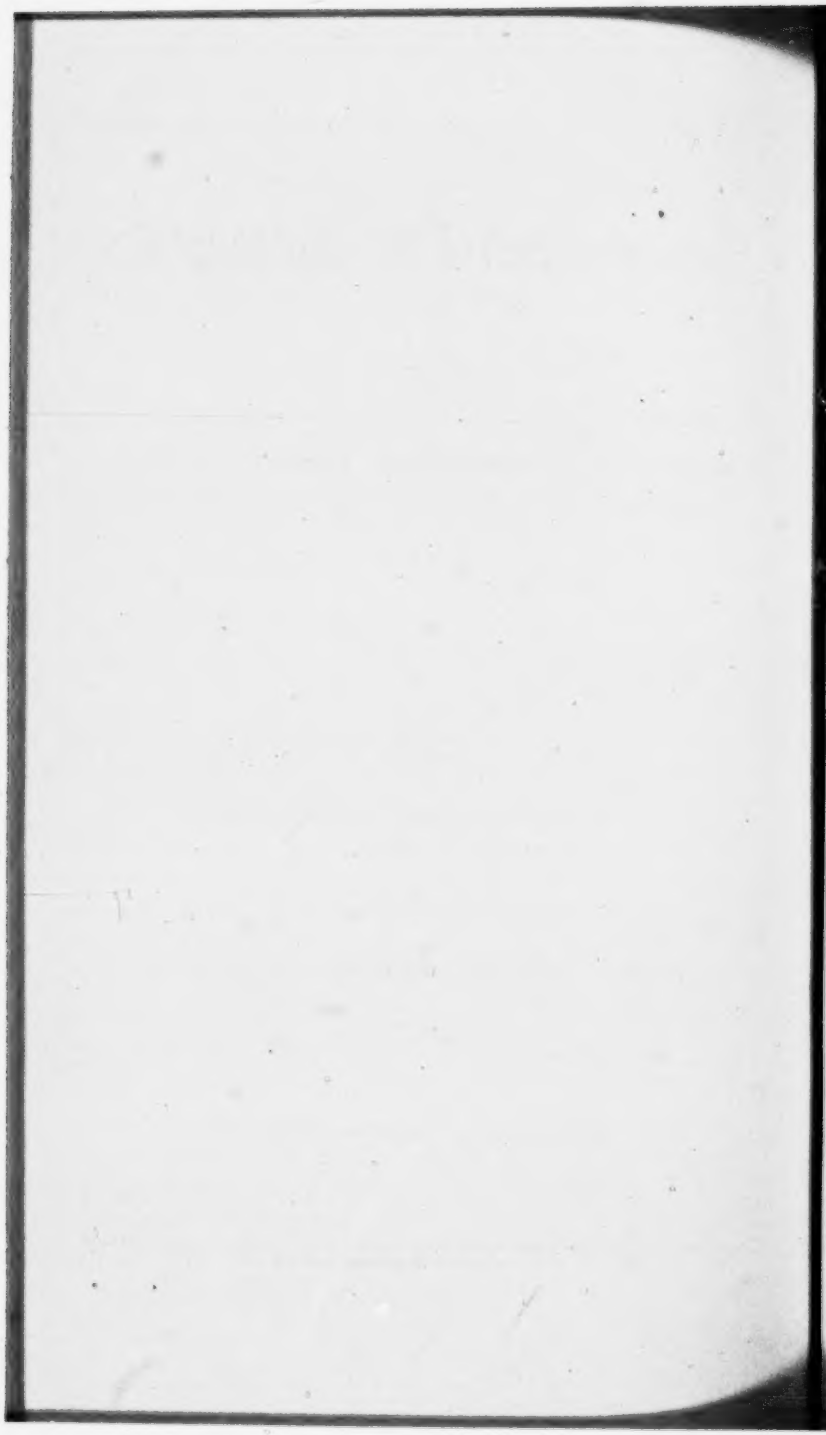
COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

ALEXANDER POPE HUMPHREY,
Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.



Supreme Court of the United States.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, - - *Plaintiff in Error,*

VERSUS

COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This is one of a series of cases, all heard together, involving the validity of a certain assessment made by the Board of Valuation and Assessment of the State of Kentucky against the Ferry Company. As all of the cases involve exactly the same question, only one record has been printed; a stipulation being on file that the other cases shall have the same judgment entered as may be directed in this case.

The Ferry Company is a corporation created by an act of the Legislature of Kentucky, of date March 29, 1869, entitled "An Act to incorporate the Louisville & Jeffersonville Ferry Company." In the appendix this act is given in full.

By the seventh clause of the act it is provided that the corporation may purchase from any existing ferry company or association any ferry-boats, wharves, and ferry franchises for any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities.

By the eighth clause it is provided that such corporation may accept such boats and franchises, wharves and other property in payment of stock subscribed, and at such prices as may be agreed upon.

Under two grants from William Henry Harrison, then the Governor and Commander-in-Chief of the Indiana Territory, ferries were established in 1802 between Jeffersonville and Louisville, and another ferry was established under an act passed in 1820 by the Legislature of Indiana. These three ferry franchises, by regular devolution of title—sometimes by inheritance and sometimes by conveyances duly recorded—came to be owned in the year 1865 by certain persons, by whom the ferry was operated as a partnership. These persons, in 1869, conveyed to the corporation created above the boats then owned by the partnership, and the above mentioned ferry franchises. (R. 9, etc.)

The Ferry Company in the year 1887 made a contract with the Sinking Fund Commissioners of the city of Louisville (in whom, by the law of the State of Kentucky, is vested the ferry privileges of the city) by which the Ferry Company leased the ferry privileges, agreeing to pay for the ferry privileges and taxes $800 a year, and a wharfage fee annually of $400.

In the year 1893 the Assessor of Jefferson County assessed, for the State tax for the year 1894, the boats and other personal property of the Ferry Company, the boats being enrolled at Louisville. The Ferry Company had no real estate in Kentucky, and no other tangible or intangible property in Kentucky. (R. 7.)

The Ferry Company had certain land in Indiana, but had no intangible property there except the ferry franchise which we have above described.

Under these circumstances, the Board of Valuation and Assessment of the State of Kentucky ascertained what had been the net earnings of the Ferry Company up to September 15,

1893, for the year preceding that date. It then capitalized these net earnings; that is, it found what sum would, at six per cent, produce the said net earnings. This was found to be $121,050.00. From this sum the Board deducted $54,164.00, being the assessed value of the Ferry Company's tangible property in Kentucky and Indiana, leaving the sum of $66,886.00, as the value of the Ferry Company's "franchise."

The net earnings above capitalized represent the Ferry Company's gains for the carriage of persons and property between the States of Indiana and Kentucky.

Upon this sum of $66,886.00 there was levied the ordinary State rate of taxation, and for the amount so produced, $284.28, the Commonwealth of Kentucky brought suit against the Ferry Company, in the Franklin Circuit Court. It obtained a judgment for the full amount claimed, and the Ferry Company prosecuted an appeal to the Court of Appeals of Kentucky, where it was affirmed. The opinion will be found at page 19 of the Record.

From this judgment the Ferry Company has prosecuted this writ of error and has assigned the following errors:

Assignment of Errors.

1. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right to consider as part of the property or as entering into the value of the franchise of the plaintiff in error its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

2. The Court of Appeals of Kentucky erred in deciding that the law under which the Board of Valuation and Assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which

has been conveyed to it, and which it owned for operating a ferry from the State of Indiana to the State of Kentucky.

3. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right, in fixing the value of the capital stock of the plaintiff or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

4. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

5. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the fourteenth amendment thereof, and did not deprive the plaintiff in error of its property without due process of law.

ARGUMENT.

The facts in this case are undisputed. The State filed its petition in the Franklin Circuit Court; the Ferry Company filed its answer, and to this answer the State interposed a demurrer, which was sustained.

The law under which the assessment was made by the State authorities is fully set out in the case of Adams Express Company v. Kentucky, 166 U. S. 172, and is printed in the appendix. The following is a statement from the opinion of the Court of Appeals:

"The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the legislature passed in 1869. It purchased a ferry franchise which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio River from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the Sinking Fund Commissioners of the city of Louisville title to the ferry rights along the Ohio River within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

"On behalf of appellant it is urged (1) that the franchise belonging to the corporation derived by it from the State of Indiana is an incorporeal hereditament, whose location is in the State of Indiana, and which can not be taxed by the State of Kentucky, nor can its value be included in any tax which the State of Kentucky endeavors to exact from it; (2) that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky, and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; (3) that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not sub-

ject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; (4) that the assessments not having been made within the years during which the taxes were due and payable, the Board of Valuation and Assessment could not make the assessment—in other words, has no right to retrospectively assess."

Upon the last question stated above, viz., the right of the State Board of Valuation and Assessment to assess retrospectively, we are of course concluded by the judgment of the Court of Appeals. Therefore we need only consider the questions in this case as stated by Judge Paynter under the first, second, and third heads.

In the answer of the Ferry Company not only are the ferry franchises which it operates fully set out, but also the manner in which it obtained them. There is also set out fully the method by which the Board of Valuation and Assessment arrived at the result reached by it.

Among other allegations made by the defendant Ferry Company are the following:

"This defendant further says that all of its tangible property in Kentucky was assessed by the assessor of Jefferson County in the fall of 1893 for the State tax for the year 1894, and the defendant paid the said tax. The property so assessed by the Sheriff of Jefferson County consisted of all of the boats and other personal property of this defendant, the defendant having no real estate in this State.

"For the same year all of the real estate owned by this defendant in Indiana was assessed by the authorities of that State, and the defendant paid the tax thereon.

"The defendant had no intangible property except the franchise hereinafter described.

"The Board of Valuation and Assessment ascertained what had been the net earnings of the defendant up to September 15, 1893, for the year preceding that date. It then capitalized said net earnings at six per cent; that is, to have been such an amount as at six per cent would produce the sum of $121,050.00. From this the Board deducted $54,164.00, being the assessed value of the defendant's

property in Kentucky and Indiana, leaving the sum of $66,886.00 as the value of defendant's franchise.

"This defendant says that it is a ferry company engaged in the transportation of passengers and freight between Louisville, Kentucky, and Jeffersonville, Indiana, and other points in Indiana; that substantially its whole revenue is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce; that is, from the carriage of persons and property between the States of Indiana and Kentucky."

Also the following allegations:

"The defendant says that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana.

"The defendant says it brought before the Board of Valuation and Assessment, before that Board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained, and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said Board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said Board making any valuation whatever of its capital stock, because all of its property had been once assessed, and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said Board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said Board refused to enter into the question of the valuation of the said franchise, granted by the State of Indiana, as aforesaid, and owned and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce.

"The defendant says that the State Board of Valuation and Assessment, in making the assessment sued on, has disregarded the Constitution of the United States, and especially the clause giving to Congress the power to regulate commerce between the States, and has also disregarded the

Constitution of the United States, and particularly the fourteenth amendment, in that it has included in its assessment for Kentucky taxation franchises derived from the State of Indiana and there exercised.

"The defendant says that the said Board of Valuation persisted, as above stated, in taking the net earnings of this defendant, capitalizing these earnings at 6 per cent, and fixing the value of its capital stock at this sum, and only deducting therefrom the value of its tangible property as assessed in Kentucky and Indiana; all of which is contrary to law and right, and in violation of the Constitution of the United States and the laws passed in pursuance thereof, and the said assessment is therefore illegal and void.

What is the nature of the Ferry Company's franchise granted to it in the State of Indiana?

The deed of cession of Virginia was of "all right, title, and claim as well of soil as of jurisdiction, which the said Commonwealth had to the territory or tract of territory within the limits of the Virginia charter, situated, lying, and being to the northwest of the Ohio River."

By the ordinance for the government of the Northwest Territory it was, among other things, in Article 4, provided:

"The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways, and forever free as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax imposed or duty therefor." (Revised Statutes of the United States, 16.)

The compact between Virginia and Kentucky, approved December 18, 1789 (Ky. Stat. 1894, page 44), provided, by the eleventh article, as follows:

"Article 11. 7. That the use and navigation of the river Ohio, so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United

States; and the respective jurisdictions of this Commonwealth and of the proposed State on the river aforesaid shall be concurrent only with the States which may possess the opposite shores of the said river."

In City of Newport v. Taylor's Executors, 16 B. M. 700, it is shown that Kentucky has never attempted to provide for the granting of a ferry franchise across the Ohio River, except from Kentucky to a landing in the State upon the other side of the river, and never for a ferry franchise from such State to Kentucky.

The question is learnedly discussed in this case, and there has never been any change in this policy.

It is again announced in Reeves v. Little, 7 Bush, 470; and the case in 16 B. M. above cited was affirmed by this Court under the name of Conway v. Taylor's Executor, 1 Black, 603.

So that it may be taken for the purposes of this part of our argument that to make up a ferry upon the Ohio River there must be, (1) the franchise granted by Kentucky to ferry from the Kentucky shore to the opposite shore, and a franchise granted by the State of Ohio, Indiana, or Illinois, to ferry from one of said States across the river to the Kentucky shore. These two franchises, like the two blades of a pair of scissors, are necessary to make up a complete ferry right.

That a ferry franchise is property is equally clear from the authorities.

In 2 Washburn on Real Property, pages 291–92, etc., it is said: "Among other incorporeal hereditaments is the franchise of conducting a ferry"; and in the same work (1st Vol., page 210) it is said that dower may also be claimed out of various species of incorporeal hereditaments which belong to the husband by inheritance, such as rights of ferry, rents, and the like.

In Stevens v. Stevens, 3 Dana (Ky.), 371, a widow was adjudged to be entitled to have dower assigned to her in a ferry.

In Lippincott v. Allender, 27 Iowa, 460, a ferry was declared

to be, if granted for years, personal property, and if granted in fee, real estate.

The Stevens case is cited with approval as establishing that a widow is entitled to dower in a ferry, in 1 Scribner on Dower, 189, and 2 Scribner (74), 599.

So in the case of Conway v. Taylor's Executor, 1 Black, 632, it is said:

> "A ferry franchise is as much property as a rent or any other incorporeal hereditament or chattels or realty. It is clothed with the same sanctity and entitled to the same protection as other property."

And in the same case the following is quoted from 3 Kent's Commentaries, 459: "An estate in such a franchise and an estate in land rest upon the same principle."

The franchise for the operation of this particular ferry granted by Indiana was admitted on all hands to be real property in the case of Mabury v. Louisville & Jeffersonville Ferry Company, 60 Fed. Rep. 649—a case decided by the Circuit Court of Appeals of the Seventh Circuit.

And again, the rights granted for this particular ferry are fully considered in Bowman v. Wathen, 2 McLean, 376, in a very learned opinion by Mr. Justice McLean. This case was affirmed in Bowman v. Wathen, 1 Howard, 189.

As shown above, it was for the acquisition of this particular ferry franchise that substantially the whole capital stock of the Louisville & Jeffersonville Ferry Company was issued. The correlative right which the Ferry Company has to ferry across the river from Louisville to Jeffersonville comes from a rental of the ferry privileges of the city of Louisville, for which the Ferry Company pays an annual compensation.

I.

The Board of Valuation and Assessment were Bound to Value the Indiana Franchise and Deduct it from the Value of the Capital Stock.

The Board of Valuation and Assessment refused to consider this Indiana franchise for any purpose. Under the law governing that Board, it is its duty to ascertain the value of the capital stock of various corporations, including ferry companies. From the value of this capital stock thus found it is its duty to deduct the value of the "tangible property" of the corporation, and this remainder the statute designates as the "value of the franchise." But it has been determined by the Court of Appeals of Kentucky, in the case of Henderson Bridge Company v. Commonwealth (99 Ky., page 634), that this so-called value of franchise is simply the value of the property of the corporation other than its tangible property, and it was upon this theory that the case of the Henderson Bridge Co. v. Kentucky (166 U. S. 151) was affirmed by this court. In the syllabus to that case it is said that the tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals.

The same ruling was made in the case of Adams Express Co. v. Kentucky, 166 U. S. 172.

In the opinion in the Henderson Bridge case this court said:

> "It appeared that the bridge company owned 9.46 miles of railroad, and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that State at $627,660; that the length of the bridge in the two States, measured by feet, was one third in Indiana and two thirds in Kentucky; that the tangible property of the company was assessed in Henderson County, Kentucky, at $649,735.54; that the capital stock of the company was $1,000,000, and that it had issued bonds to the amount of $2,000,000.
>
> "From the evidence before them the Board of Valuation and Assessment placed the value of the company's entire

property at $2,900,000, and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this $649,735.54, the value of the tangible property in Henderson County, was deducted, and the remainder, $865,157.46, was fixed by the Board as the value of the company's franchise."

Again the court said:

"The only franchises treated here as the subject of taxation were those granted by the State of Kentucky. So far as the State of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the State of Indiana, the value of which was not included in the tax complained of."

Exactly the opposite of this is true in the case at bar. There is included in this valuation of the so-called franchise the right which the corporation acquired from its grantors to the ferry franchise granted by and under the authority of the State of Indiana.

The learned judge, in delivering the opinion of the Court of Appeals of Kentucky in this case, attempted to meet this argument in the following way:

"If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now exists in Kentucky. We do not think the case of Henderson Bridge Company v. Commonwealth, 99 Ky. 623, is in conflict with the view here expressed. There the Commonwealth only attempted to tax its franchises to low water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana, and presumably held and operated by virtue of it."

If we understand the thought here expressed, it is that if a corporation created by the laws of the State of Kentucky acquires property, such as a ferry franchise, from another State, that property is taxable in Kentucky; not in and of itself so taxable, but taxable because it increases the value of the Kentucky franchise. If this is true, then a railroad, organized under the laws of the State of Kentucky, and owning a line in Indiana, can be taxed in Kentucky upon the value of that line. But if the Kentucky railroad has an Indiana charter, it can not be taxed upon the value of its Indiana line. In the one case the court would hold that the Indiana corporation owned the Indiana franchise and property; whereas, in the other case, it would hold that, as the Kentucky corporation owned the Indiana franchise and the Indiana property, it was taxable in Kentucky.

Under Section 4082 of the Kentucky Statutes an individual or partnership engaged in the business of a ferry company would have an assessment made by the Board of Valuation and Assessment exactly as it would be made in the case of a corporation. Suppose an individual or partnership owned this Indiana franchise and had leased the Kentucky franchise; it surely could not be claimed that the Indiana franchise could be taxed in Kentucky as against this individual or partnership. And no more can it be valued in making an assessment against a corporation.

The opinion of the court is a mere assertion that all property of a corporation organized under the laws of Kentucky can be taxed in Kentucky, it matters not where it is situated and whether it be real or personal property. Such a doctrine, we submit, has never before been announced or even intimated as to real property; and if we are right in our proposition that the Indiana ferry franchise is an incorporeal hereditament, and therefore having its situs in Indiana, it can not be taxed in Kentucky either directly or indirectly.

It is, we suppose, hardly necessary to cite authority to show that one State can not tax real property situated in another State.

In Cooley on Taxation, 2d Ed., page 55, it is said:

> "It has already been seen that persons and property not within the territorial limits of a State can not be taxed by it. In such a case the State affords no protection, and there is nothing for which taxation can be an equivalent. . . . But real property out of the State can not be taxed to the owner within it. While, on the other hand, all real estate of a non-resident is taxable where it is, though the tax will be upon the land merely and will not be a personal charge upon the non-resident owner."

So, in 25 A. & E. Ency. of Law, page 130, it is said:

> "The State may tax land within its limits, whether owned by a resident or non-resident, unless such land is within the recognized exceptions, as where it belongs to an Indian tribe or to the Federal Government. Land is not only to be assessed by the State in which it lies, and by it alone, but it is to be taxed, as a general rule, only in the subdivision of the State in which it is situated, whether the subdivision be a county, town, school district, or other public corporation."

For the State of Kentucky to give an extra territorial operation to its taxing laws, so as to reach property whose situs is in another State, is to deny to the person thus burdened the equal protection of the laws, and is to deprive him of his property without due process of law. If there is any contrary authority to this we do not know it.

This court has, in various cases, considered the subject of taxation by several States of the property of a corporation doing business in all of these States. Thus the Western Union Telegraph Company has its lines extending through many States of the Union. So has the Adams Express Company. So, also, there are various railroad corporations owning lines extending through several States.

The taxing laws of these States have been directed towards the proper assessment of the aliquot part of such unit properties

situated within the territorial limits of the taxing power. This court has held that it is lawful, in determining the value of this aliquot part, to take into consideration the value of the whole property of the corporation, and that this whole property may be fairly and justly apportioned according to its mileage of line, say of railroad or telegraph, or route, as of express companies, in these various States.

In this way it has been held lawful to tax not merely the tangible property which has its situs in one of these States, but the added value to the tangible property given to it by its unity of use.

At the same time, this court said, in Adams Express Company v. Ohio, 166 U. S. 222 (the opinion which may be considered as the summing up of its conclusions by this court upon this general subject) that,

> "It is suggested that the company (Adams Express Company) may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other States, but are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company, and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a State in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this Court. Pittsburgh, Cincinnati, &c., Railway Co. v. Backus, 154 U. S. 421, 443; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 23; Adams Express Co. v. Ohio, 165 U. S. 194, 227."

In the first of these cases, Pittsburgh Railroad v. Backus, 154 U. S., at pages 443–4, this court assumes that the mileage

apportionment would not be a fair one if special circumstances existed to distinguish between the conditions in the two States, such as "terminal facilities of enormous value in one and not in the other."

In the case at bar it is showed clearly that the Ferry Company did bring to the attention of the Board of Valuation and Assessment its ownership of this Indiana franchise, and that this was an element which the Board was bound to consider in fixing what proportion in value of the whole capital stock was subject to taxation in Kentucky.

The revenue law under which the Board was acting, by Section 4080, required an apportionment if the corporation was a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company, and the lines extended beyond Kentucky.

We respectfully submit that this apportionment must be made in the case of a ferry company as well. Such an apportionment was made in the Henderson Bridge case, and a bridge company is no more mentioned in Section 4081 than is a ferry company.

The Court of Appeals, in the opinion by Judge Paynter, says:

> "The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville, by reason of its acquisition of privileges which were originally granted under the laws of that State."

Again the court said:

> "By virtue of its corporate authority the appellant acquired ferry-boats, the ferry rights within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio River, and the necessary use of its wharf to carry on that business. It also, by contract (which its charter seems to have authorized it to do), acquired wharf privileges on the Indiana side, and also the right which had been previously granted by

Indiana to transport persons and property from Indiana to Kentucky over the Ohio River. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property, and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment.

"If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase, which is sought to be taxed, but the value of its franchise, which has been created in and now exists in Kentucky."

This entirely upsets the whole theory of apportionment which this court has been at such pains to justify, and, under the ruling of the Court of Appeals of Kentucky, the whole of the intangible property of a Kentucky corporation is assessable in Kentucky, it matters not that this intangible property may consist of an incorporeal hereditament, or may be the added value to the tangible property by the use to which the whole property is put.

So that, according to this decison, if the Adams Express Company was incorporated under the laws of the State of Kentucky, it would be competent for Kentucky to value its whole capital stock, and deduct nothing therefrom, except the value of its tangible property situated in the other States where it carried on its business. And the case at bargoes even farther than that, because it justifies the refusal of the assessing officer to deduct the value of the incorporeal hereditanent of the Ferry Company, granted to it by and having its situs in the State of Indiana.

We respectfully submit, therefore, that in no view of the law on this subject can this assessment be supported.

It is proper to say that the Board of Valuation and Assessment, in refusing to ascertain the value of the Indiana ferry franchises, followed the language of the statute, Section 4079,

providing for a deduction of the tangible property only in order to arrive at the value of a corporate franchise. As the Indiana ferry franchise, although an incorporeal hereditament, is not tangible property, the Board followed the statute, and, if the statute is valid, was right in refusing to deduct it. Our argument, of course, is addressed to the proposition that it is unconstitutional for Kentucky to direct the deduction simply of tangible property, and not other property, such as an incorporeal hereditament, which, though it may be intangible property, yet is property, and has its situs outside of the territorial jurisdiction of the State.

II.

The Tax is Void as a Regulation of Interstate Commerce.

In the opinion of the Court of Appeals of Kentucky in this case it is said:

> "The appellant owns certain ferry-boats, which are enrolled at the port of Louisville. It owns certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana, and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixes the value of the franchise of the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

Again it says:

> "The appellant is domiciled in Kentucky, and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income, or revenue, but its income is alone considered in fixing the value of its franchise."

In the answer in this case it was expressly averred that the Ferry Company had no intangible property except the franchise thereinafter described, which was the franchise granted in Indiana. It was further expressly alleged that the Board of Valuation and Assessment arrived at the value of defendant's franchise by capitalizing its net earnings, and that these net earnings were derived from the carriage of persons and property between the States of Indiana and Kentucky. And this was admitted by demurrer. Indeed, the opinion of the Court of Appeals of Kentucky meets the case squarely, and insists that it is competent for the State to value what it calls the Ferry Company's franchise, by capitalizing the earnings of the Ferry Company, which it derives from interstate commerce. We respectfully submit that the decisions of this court conclusively show that this can not be done.

In Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, it appeared that there was a ferry company incorporated by the laws of the State of New Jersey, which ran a ferry from the town of Gloucester in that State to the city of Philadelphia in Pennsylvania. The law of Pennsylvania provided that every company or association doing business in Pennsylvania or having capital employed in that State (with certain exceptions) should be subject to and pay into the treasury of Pennsylvania, annually, a tax to be computed thus: If the dividend during any year amounted to 6 or more than 6 per cent, then the tax was to be at the rate of half a mill upon the capital stock. If no dividend was made or declared, or if it should not amount to 6 per cent, then the tax was to be at the rate of 3 mills upon each dollar of the valuation of capital stock, made in accordance with the provisions of another section of the act.

Mr. Justice Field delivered the opinion of this court, and held that the tax could not be exacted. We forbear to quote from this opinion, because it would be difficult to select passages

from it. The whole opinion is a demonstration that such a tax is a regulation of interstate commerce, and invalid.

It is to be observed in this case that the corporation which the State of Pennsylvania was endeavoring to tax was a New Jersey corporation. But this is not a material circumstance, as is proved by the next case which we shall cite, viz: Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326.

In that case the State of Pennsylvania endeavored to lay a tax upon the gross receipts of a steamship company incorporated under its laws. It was held that as these receipts were derived from the transportation of persons and property by sea between different States, and to and from foreign countries, this tax was a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution, and void.

This is a very full discussion of this subject, and again we forbear to make extracts, as the whole opinion must be read in order to see with what force it bears upon the case at bar.

In the case of the Covington and Cincinnati Bridge Company v. Kentucky, 154 U. S. 204, the question was as to the right of the State of Kentucky to regulate the tolls upon a bridge over the Ohio River uniting the cities of Covington, Kentucky, and Cincinnati, Ohio. This court held that such an act was beyond the power of the State of Kentucky, and distinctly held that a bridge as well as a ferry boat is a vehicle of commerce; and further held that it did not follow that, because a State might authorize a ferry or bridge from its own territory to that of another State, it might regulate the charges upon such bridge or ferry.

In Adams Express Company v. Ohio, 166 U. S. 185, Mr. Justice Brewer, on page 218, said:

> "Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through

> the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce."

In the case at bar, it is true that Kentucky authorized this corporation to be a ferry company, and further authorized it to issue its capital stock in payment for the Indiana ferry franchise. But this charter did not make the corporation a ferry company. It was compelled to otherwise acquire the right to transport persons and property across the Ohio River.

How far the State could, under its police powers, regulate this ferry it is not pertinent here to inquire. There is certainly a difference between the right to acquire property and the right to property actually acquired. This corporation is given corporate life by the act of the Legislature of Kentucky. Having this corporate right, it acquired by conveyance this Indiana ferry franchise, and by lease this Kentucky ferry franchise. It has paid to Kentucky taxes on all of its property in Kentucky. It pays to the city of Louisville annually a rental for the ferry privilege leased to it by the city of Louisville. It has acquired for value—viz., the issue of its stock—the Indiana ferry franchise. Having acquired these properties it derives a certain revenue from them, but this revenue is derived entirely from interstate commerce.

This being true, when the Ferry Company paid to the State of Kentucky the tax upon all property, tangible and intangible, which it owned within the situs of its domicile, there was nothing more which the State would have the right to tax.

It is admitted, as we have shown above, that the present exaction comes alone from an effort by the tax assessors to capitalize income derived by the corporation from interstate commerce. We submit that there is no difference, in principle, between such a tax and the one declared by this court to be invalid, in the Gloucester Ferry case, 114 U. S. 206, and in the Philadelphia Steamship case, 122 U. S. 326.

III.

The Privilege Here Attempted to Be Taxed is One Derived from the United States, and Hence is not Taxable by the State.

We have heretefore assumed in this brief that it was entirely within the power of the States of Kentucky and Indiana to grant to the Ferry Company the right to operate a ferry between the cities of Louisville and Jeffersonville. Obviously, it is the profitable use of this right which the State is attempting here to tax. It is admitted that the Ferry Company has paid to the State of Kentucky a tax upon all of its tangible property having a situs in Kentucky.

What other property has the Ferry Company taxable by that State? It is answered that the value of the Ferry Company's tangible property is vitalized by the way in which its tangible property is used, and it is this added value that is attempted to be reached by the Board of Valuation and Assessment.

But, we submit, this added value does not come from Kentucky, but is held by the Ferry Company under the Constitution and Laws of the United States. It is true that Kentucky granted an act of incorporation to the Ferry Company. It is also true that this act of incorporation—this right to be a corporation—is not a franchise that Kentucky attempts to tax. It does not attempt to lay any tax upon the franchise to be a corporation. This has been expressly decided by the Court of Appeals of Kentucky in the case of the Louisville Tobacco Warehouse Company v. Commonwealth, 20 Ky. Law Rep. 1747, where the matter is fully considered in the principal opinion by Judge DuRelle, and in the concurring opinion by Judge Hobson.

What other franchise does the Ferry Company derive from the State of Kentucky? Does it derive from that State the right

to navigate the Ohio River and to transport persons and property across a navigable stream which is the boundary between two States?

The Ferry Company has obtained its right to land in Louisville by a lease from the city of Louisville, acting through the Commissioners of the Sinking Fund, and it pays an annual rental besides wharfage. It derives its right to land in Indiana by having purchased the ferry franchises which are described in a former part of this brief. The only other right which it has is to navigate the river. This right, we respectfully submit, is one which is derived from the United States, and to attempt to put any tax or burden upon this right is an attempt to regulate commerce between the States.

The case of Gibbons v. Ogden, 9 Wheaton, 1, was a contest over what was in effect a ferry between New York City and Elizabethtown, N. J. In that case, Chief Justice Marshall remarked that laws respecting ferries as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States are component parts of an immense mass of legislation, embracing every thing within the limits of the State not surrendered to the General Government. But it is to be observed in that case that he held the law of New York, attempting to regulate this ferry between New York City and Elizabethtown, void.

In Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196 (which has already been referred to), there was under consideration the right of Pennsylvania to tax a ferry between Gloucester, New Jersey, and the City of Philadelphia. It was held that this could not be done; and one clause of the syllabus (9) is as follows:

> "The transportation of passengers and freight for hire by a steam ferry, across the Delaware River from New Jersey to Philadelphia, by a corporation of New Jersey, is interstate commerce which is not subject to exactions by the State of Pennsylvania."

In that case, Mr. Justice Field, delivering the opinion of the court, referred to Judge Marshall's statement in regard to laws respecting ferries, but said that this language plainly referred to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; that as Congress had passed various laws respecting ferries between a State and a foreign State, and between two States, it meant that such commerce should be free from State exactions. Thus the court said:

> "Such a ferry is a means, and a necessary means, of commerical intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them."

In Covington Bridge Company v. Kentucky, 154 U. S. 304, the court, in holding that the State of Kentucky could not regulate the rates of toll across an interstate bridge, likened such interstate bridge to an interstate ferry. The court said, in reference to the case of Conway v. Taylor's Executor, 1 Black, 603:

> "In that case a ferry franchise on the Ohio was held to be grantable, under the laws of Kentucky, to a citizen of that State who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the State. The opinion, however, did not pass upon the question of the right of one State to regulate the charge of ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it can hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right, in a number of instances, since the adoption of the Constitution, to fix the rates of toll

upon interstate ferries and bridges, and perhaps, in some instances, have been recognized as having authority to do so by the courts of the several States, but we are not aware of any case in this court where such right has been recognized."

In Philadelphia Company v. Pennsylvania, 122 U. S. 326, which we have before adverted to, this court declared unconstitutional a law of the State of Pennsylvania attempting to levy a tax on receipts by a steamship company organized under the laws of the State of Pennsylvania, where such receipts were derived from interstate and foreign commerce. And this was upon the distinct ground, as we understand it, that the right of the steamship company to conduct interstate commerce or foreign commerce was derived, not from the State, but from the United States.

It is difficult to make a selection from the many cases decided by this court holding that commerce between the States must be free from State exactions; we may refer, however, to Hall v. De Cuir, 95 U. S. 485; Moran v. New Orleans, 112 U. S. 69; Harmon v. Chicago, 147 U. S. 396.

In the case at bar it is alleged in the answer and taken as true that the boats of the Ferry Company are enrolled at the port of Louisville. It would be tedious to point out the many regulations which Congress has made in reference to steam craft navigating the waters of the United States, including in these regulations ferry-boats. We are not here concerned with the question as to whether, as long as Congress does not act, there may not be a police power in the States bordering upon the Ohio and other navigable waters; but this, as has been recognized in many cases in this Court, is an entirely different question from that involved in the assertion by the State of a right to lay a tax upon the privilege of navigating such waters.

So, in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 701, this court said:

> "But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which vary more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden."

This case is essentially different from the Henderson Bridge case above referred to, in 166 U. S. 150, this Court, in that case, saying:

> "Clearly the tax was not a tax upon the interstate business carried on, over or by means of the bridge, because the Bridge Company did not transact that business. That business was carried on by the persons and corporations which paid the Bridge Company tolls for the privilege of using the bridge."

In the case at bar the commerce is carried on by the Ferry Company, and the tax attempted to be levied by the State of Kentucky is confessedly based upon the receipts from that commerce. In other words, it is not denied by the Court of Appeals of Kentucky that the Ferry Company, having paid all taxes due by it on its tangible property situated in Kentucky, is now asked to pay a further tax, which is arrived at by capitalizing the net earnings derived by the Ferry Company wholly from interstate commerce, and deducting therefrom the value of its tangible property.

We can hardly imagine a more direct way of levying a tax upon the gains from interstate commerce.

For this reason, also, we insist that the tax here attempted to be collected is contrary to the Constitution of the United States.

In conclusion, we desire to call the attention of the Court to the fact that all these questions were brought to the attention of the Board of Valuation and Assessment, and that they refused to enter into or consider them, or to allow the assessment to be at all affected by them.

We submit that the judgment of the court below should be reversed, with directions to dismiss the petition of the Commonwealth.

Respectfully,

ALEXANDER POPE HUMPHREY,

For Plaintiff in Error.

APPENDIX.

An Act to Incorporate the Louisville and Jeffersonville Ferry Company.

Be it Enacted by The General Assembly of the Commonwealth of Kentucky:

1. That Z. M. Shirley, W. C. Hite, John B. Smith, Howard Johnson, and R. H. Woolfolk, are hereby created a body corporate, by the name of "The Louisville and Jeffersonville Ferry Company"; and by that name shall have perpetual succession, and may sue and be sued, contract and be contracted with, purchase and hold all such property, real and personal, as may be necessary or convenient to enable such corporation to carry on the business of ferrying freight and passengers and vehicles over the Ohio River, and generally to do and perform all such acts as an individual might do and perform in the premises.

2. The capital stock of said company shall consist of two thousand shares of stock of the par value of one hundred dollars each.

3. The business of said corporation shall be controlled by five directors, to be chosen annually, and by a president, to be elected by them, who may or may not be one of their number, as they may determine.

4. The corporators above named shall act as directors for one year from the time they shall accept this charter, and as such shall have all the powers granted herein to the directors.

5. There shall be elected by the directors a secretary and such other officers as their by-laws may direct, who shall hold their offices respectively until the election of a new board of directors, and until their successors are elected and qualified.

6. The manner, time, and place of holding elections, and giving notice thereof, of subscribing, paying, and transferring stock,

of compensating officers, and generally of conducting and managing the business and corporate affairs of said corporation, shall be regulated by by-laws to be adopted by the directors, who are hereby authorized to enact and repeal such by-laws at pleasure; and the same while in force shall have the same force and effect as if enacted herein, provided they are not inconsistent with the Constitution and laws of the State.

7. Said corporation may purchase from any existing ferry companies or associations any ferry-boats, wharves, and ferry franchises for any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities.

8. Said corporation may accept such boats and franchises, and wharves and other property in payment of stock subscribed, and at such prices as may be agreed on.

9. Said company shall have a lien to secure their ferriage due upon any horses or vehicles ferried by them, and may refuse to permit such horses or vehicles to leave their boats until such ferriage is paid, or may assert their lien by suit in the Louisville Chancery Court, without regard to the amount due or claimed to be due.

10. This act shall continue in force fifty years, and is declared to be in force from and after its passage; but the right to amend or change this charter, or any part thereof, is expressly reserved.

Approved March 16, 1869.

Provisions of Kentucky Statutes as to Board of Valuation and Assessment.

Section 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge

company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 4095 of this article. The place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be Chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

Section 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by Section 4092 of this article, shall, annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in

such form as the Auditor may prescribe, showing the following facts, viz:

The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require.

Section 4079. Where the line or lines of any such corporation, company, or association extend beyond the limits of the State or county the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts

of the corporation, company, or association in this State and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said Board may excuse the officer from answering such questions; Provided, That said Board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company, or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise, subject to taxation as aforesaid.

Section 4080. If the corporation, company, or association be, organized under the laws of any other State or government, except as provided in the next section, the Board shall fix the value of the capital stock, as hereinbefore provided, and will determine, from the amount of the gross receipts of such corporation, company, or association, in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the 15th day of September of the year in which the assessment was made, bear to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

Section 4081. If the corporation organized under the laws of this State, or of some other State or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company, the lines of which extend beyond the limits of this

State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed or liable to assessment, in any such county, city, town, or taxing district.

Section 4082. Whenever any person or association of persons, not being a corporation, nor having capital stock, shall in this State engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

Section 4083. It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the Chairman of the Board is hereby authorized to summon and swear witnesses, and after hearing such evidence, the Board may change the valuation as it may deem proper, and the action of the Board shall be final.

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No. 113.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

D. W. SANDERS,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 113.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

I.

It is insisted by the plaintiff in error that the franchise tax attempted to be collected in this action by the defendant in error is unconstitutional, because it is engaged in the operation of a ferry between Louisville and Jeffersonville, which is interstate commerce. Reliance to sustain this position is upon the decisions of this court in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, and Philadelphia and Southern Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

Justice Bradley, in delivering the opinion of this court in the steamship case last quoted (p. 345), said:

"The corporate franchises, the property, the business, the "income of corporations created by a State, may undoubtedly

"be taxed by the State; but in imposing all taxes, care "should be taken not to interfere with or hamper, directly "or by indirection, interstate or foreign commerce, or any "other matter exclusively within the Federal Government," &c.

Mr. Justice Field, in delivering the opinion of the Supreme Court in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 206, said:

"It is true that property of corporations engaged in for- "eign or interstate commerce, as well as the property of cor- "porations engaged in other business, is subject to State "taxation, provided always it be within the jurisdiction of "the State. As said by Chief Justice Marshall in McCulloch "*vs.* Maryland (4 Wheaton, 316–329), 'All subjects over "which the sovereign power of a State extends are objects "of taxation; but those over which it does not extend, are, "upon the soundest principles, exempt from taxation.' "This proposition may almost be pronounced self-evident."

This ferry company is a domestic corporation created by an act of the legislature of Kentucky. The power of the State is exercised in this instance by the levy of a tax on the franchises granted this corporation. It is the value of the franchises contained in its charter which is the subject of taxation by its sovereign. The procedure to ascertain the value of the franchises is provided for in the taxing laws of the State. In the exercise of this power the board of valuation and assessment ascertained the value of the franchises which enables this corporation to conduct its business, under its charter, in the opera-

tion of its ferry between Louisville and Jeffersonville. The franchise thus taxed is not the ferry privileges granted by the territorial government of Indiana or by the State of Indiana after its admission into the Union; but it is the franchise which enables this corporation to acquire, own, and operate the ferry privileges which were granted by the Territory and the State of Indiana, in the manner set out in the answer in the trial court below. The right to acquire these ferry privileges in Indiana, and the ownership of these ferry privileges in Indiana, is the franchise which the State of Kentucky granted this corporation, and this franchise is the property of the corporation which the State of Kentucky has valued and levied a tax on, in accordance with its constitution and the general taxing laws of the State. It is not the property in Indiana which is taxed, but it is the franchise right in the corporation to acquire ownership of this property. The value of the franchise is ascertained by deducting the value of the tangible property of the corporation from the estimated value of the capital stock of this corporation. The value of the capital stock is determined by the net earnings of the corporation upon a 6 per cent. valuation.

There is no effort on the part of Kentucky to tax the gross receipts of the corporations, or of the passengers transported, or of the freight carried, or of the tonnage of the boats employed by it in the transportation of passengers and freight from Kentucky to Indiana.

The value of the corporate franchise is not to be determined by the fact that boats employed in the transportation of passengers and freight have a right to land on the Indiana shore at Jeffersonville. The value of this right is to be

ascertained and determined by the corporate power granted under the provisions of the charter by the State of Kentucky. Without this power the corporation could not have acquired the ownership of these ferry rights and privileges in Indiana, and the value consists largely under the power granted this corporation to maintain and operate a ferry between the points indicated. The power to acquire the ownership of these ferry privileges in Indiana is a valuable franchise granted this corporation, and it is this franchise which the State undertakes to tax and not the franchise to be a corporation. This franchise authorizes the corporation to purchase these ferry privileges, and also the necessary equipments to operate the ferry, and to pay therefor with its capital stock.

As was said by this court in Henderson Bridge Co. *vs.* Kentucky, 166 U. S., 153 :

" The company was chartered by the State of Kentucky " to build and operate a bridge, and the State could properly " include the franchise which it has granted in the valua- " tion of the company's property for taxation."

Mr. Justice Shiras, in Erie R. R. Co. *vs.* Pennsylvania, 158 U. S., 437, said :

" Undoubtedly, state taxation of interstate commerce, di- " rectly placed upon articles or subjects of such commerce, " or upon the necessary means for their transportation, may " be used to restrict or regulate such commerce, and more " than once this court has been obliged to pronounce in- " valid State legislation respecting these matters. In other " words, we have frequently had occasion to show that the " existence of Federal supervision over interstate commerce,

"and the consequent obligation on the Federal courts to "protect that right of control from encroachments on the "part of the State, are not inconsistent with the power of "each State to control its own internal commerce, or to tax "the franchise, property or business of its own corporations, "engaged in such commerce, nor with its power to tax for- "eign corporations on account of their property within the "State."

In Adams Express Co. *vs.* Ohio, 166 U. S., 221, Mr. Justice Brewer, in delivering the opinion of this court, said:

"The distinction must be noticed between the construc- "tion of a State law and the power of the State. If a stat- "ute, properly construed, contemplates only the taxing of "horses and wagons, then those belonging to an express "company can be taxed at no higher value than those be- "longing to a farmer. But if the State comprehends all "property in its scheme of taxation, then the good will of "an organized and established industry must be recognized "as a thing of value. The capital stock of a corporation, "and the shares in a joint stock company, represent not "only the tangible property, but also the intangible, includ- "ing therein all corporate franchises and all contracts, "privileges and good will of the concern."

II.

It is insisted that the levy of this tax upon the franchises of the corporation is in conflict with the fourteenth amendment of the Constitution of the United States, and therefore unconstitutional.

In the answer of plaintiff in error in the trial court below, it is distinctly stated that it protested against the valuation of the intangible property of this corporation when made by the board of valuation and assessment. It had the opportunity of appearing before the tribunal or the board created by the laws of the State (and did appear) which valued and assessed the franchise in accordance with the taxing laws of the State of Kentucky.

In Hagar *vs.* Reclamation District, 111 U. S., 710, Mr. Justice Field, in delivering the opinion of this court, said:

"But where a tax is levied upon property, not specifically, "but according to its value to be ascertained by assessors "appointed for that purpose, upon such evidence as they "may obtain, a different principle comes in. The officers, "in estimating the value, act judicially, and in most of "the States provision is made for the correction of "errors committed by them, through boards of revis- "ion or equalization setting a designated period pro- "vided by law, to hear complaints respecting the jus- "tice of the assessments. The law, in prescribing the "time when such complaints will be heard, gives all the "notice required, and the proceeding by which the valua- "tion is determined, although it may be followed, if the "tax be not paid, by sale of the delinquent's property, is "due process of law."

Horn Silver Mining Co. *vs.* New York, 143 U. S., 312; opinion of Field.

D. W. Sanders,
For Defendant in Error.

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No. 17.

LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY

vs.

COMMONWEALTH OF KENTUCKY.

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D. W. SANDERS,
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GEO. A. LOUD PUBLISHING HOUSE PRINT, FRANKFORT, KY.

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No. 17.

LOUISVILLE AND JEFFERSONVILLE FERRY CO

vs.

COMMONWEALTH OF KENTUCKY.

The statement of facts in this case are given in the brief filed by counsel for plaintiff in error. As the statement is substantially correct, the same is accepted for the purposes of this trial.

The Constitution of Kentucky provides for the taxation of corporate property, like individual property. Section 174 of said instrument is in these words:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

By section 4020, Kentucky Statutes, which became the law November 11, 1892, after the adoption of the State Constitution, it is provided:

"All real and personal estate within this State, and all personal estate of persons residing in this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Provision is made in the same chapter (known as chapter 108, title "Revenue and Taxation") for the assessment and taxation of the intangible property or franchise value of the corporations that have, or exercise, any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service.

By section 4077, Kentucky Statutes, title "Revenue and Taxation," it is provided:

"Section 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article. The place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where

more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be Chairman of said Board, and shall convene the same from time to time, as the business of the board may require."

By section 4078 it is provided:

"Section 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 4092 of this article, shall, annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.:

"The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require."

Notice may be given to such corporations, and the board may hear evidence and change the valuation made under section 4083, Kentucky Statutes, title "Revenue and Taxation," which reads as follows:

> "Section 4083. It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence, the board may change the valuation as it may deem proper, and the action of the board shall be final."

It was by virtue of the power and authority conferred upon the Board of Valuation and Assessment by the several sections of the Kentucky Statutes aforesaid that it proceeded to assess and fix the franchise value of the Louisville and Jeffersonville Ferry Company for the several years mentioned. That company is a corporation, created and organized under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Louisville and Jeffersonville Ferry Company," approved March 16, 1869. Under its charter said company exercises special and exclusive privileges, not allowed by law to natural persons, and also performs certain public services.

The proceedings of the board in this case conform to the rule laid down by the Court of Appeals of Kentucky in the case of the Henderson Bridge Company vs. The Commonwealth, 99 Ky. Reports, page 623.

This, in effect, is no more than a tax upon the intangible property of the corporation.

The Louisville and Jeffersonville Ferry Company refused to pay the tax on its intangible property as fixed and declared by the Board of Valuation and Assessment.

The findings of that board were judicial in character, from which there was no appeal. It did appear on notice before

that board, and made its defense. It was said by the Court of Appeals of Kentucky in the case of the Henderson Bridge Company vs. The Commonwealth, supra:

> "It should be further said that the findings of this Board of Valuation and Assessment partook of a judicial nature. The defendant had its day in court. It did appear on notice before that board, and on evidence made its defense. And on this hearing that board rendered its decision in fixing the value of the franchise of the defendant, granted by authority of the State of Kentucky; and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts unless the bond proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged or shown to exist."

The plaintiff in error, being in default in the payment of its taxes on its intangible property or franchise as fixed by the Board of Valuation and Assessment, the Commonwealth of Kentucky instituted these several actions on the 27th day of August, 1898, in the Franklin Circuit Court, to recover the taxes and the penalties denounced by law. Judgments were rendered in favor of the plaintiff for the taxes due in each of said years, and that judgment was affirmed by the Court of Appeals of Kentucky.

The opinion of the Court of Appeals was rendered by Judge Paynter, and is as follows:

> "The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897 and 1898. The appellant is a corporation organized under a special act of the Legislature, passed in 1869. It purchased a ferry franchise which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio river from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport

persons and property from Jeffersonville, Ind., to Louisville, Ky. There was vested in the sinking fund commissioners of the city of Louisville title to the ferry rights along the Ohio river within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

"On behalf of appellant it is urged, first, that the franchise belonging to the corporation, derived by it from the State of Indiana, is an incorporeal hereditament, whose location is in the State of Indiana, and which can not be taxed by the State of Kentucky, nor can its value be included in any tax in which the State of Kentucky endeavors to exact from it; second, that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; third, that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not subject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; fourth, that the assessments not having been made within the years during which the taxes were due and payable, the Board of Valuation and Assessment could not make the

assessment, in other words, has no right to retrospectively assess.

"We will consider the first and second objections together. We deem it unnecessary to enter into a consideration as to the meaning of the eleventh article of the compact with Virginia. It is sufficient to say that in Newport, &c. vs. Taylor's Ex'ors, 16 Ben Mon., 784, and Reeves vs. Little, 7 Bush, 469, this court has held that the State of Kentucky has the right to grant a ferry franchise for the transportation of persons and property to the States on the northern side of the Ohio river, and that she has never attempted to exercise the right to grant a ferry franchise for the transportation of persons or property from northern shore of the Ohio river to the Kentucky shore, but the statutes of Kentucky only attempted to regulate the transportation of persons and property from this State's northern boundary to the opposite shore of the Ohio river. From our view of the question here involved it is unnecessary to enter into a consideration of the question as to the right which the State of Kentucky might exercise in the matter of regulating transportation of persons and property across the Ohio river from its northern to its southern shore. The appellant is a Kentucky corporation. The Board of Valuation and Assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river. But under certain sections of the Kentucky Statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess, or attempt to assess, the property, either tangible or intangible, which it owned in the State of Indiana.

"By virtue of its corporate authority the appellant acquired ferry boats, the ferry rights within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio river, and the necessary use of its wharf to carry on that business. It also, by contract (which its charter seems to have authorized it to do), acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from

Indiana to Kentucky over the Ohio river. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foreging property, and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in, and now exists in, Kentucky.

"We do not think the case of Henderson Bridge Co. vs. Commonwealth, 99 Ky., 623, is in conflict with the views here expressed. There the Commonwealth only attempted to tax its franchise to low-water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana, and presumably held and operated by virtue of it.

"There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property.

"The Supreme Court, in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 208, said: 'It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State.'

"In Morgan vs. Parham, 16 Wall, 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a

regular line of steamers between Mobile, in that State, and New Orleans, in Louisiana. In that case the court said: 'It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value.'

"If the State was attempting to impose a tax upon the gross receipts or revenues of the appellant it might be plausibly argued that it was a tax imposed upon interstate commerce, for it was held in Philadelphia & Southern Steamship Co. vs. Pennsylvania, 122 U. S., 326, that a State tax upon the gross receipts of the steamship company incorporated under its laws, which are derived from the transportation of persons and property by sea, between different States, is a regulation of interstate commerce, in conflict with the exclusive powers of Congress under the Constitution, but the court (345) said: 'The corporate franchises, the property, the business, the income of corporations created by a State, may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government.'

"In Henderson Bridge Co. vs. Kentucky, 166 U. S., 154, the court said: 'The fact that the tax in question was to some extent affected by the amount of the tolls received, and, therefore, might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the *business transacted.*' This very question was decided in Erie Railroad v. Pennsylvania, 158 U. S., 431-439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and

not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.'

"The appellant is domiciled in Kentucky, and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income or revenues, but its income is alone considered in fixing the value of its franchise. The Board of Valuation and Assessment has the right to make retrospective assessments. Section 4090, Kentucky Statutes, reads as follows: 'Should any corporation fail to make the report, as required herein, on or before the 1st day of October of each year, the said board shall proceed to ascertain the facts and values, as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly.' By this section, if the reports are not made within the time prescribed by law, the board may proceed to ascertain the facts and values as required by the article, and, in our opinion, it was intended by this section that they should exercise this power at any time. Besides, section 4077 provides that the Auditor may call the Board of Valuation and Assessment together from time to time, as the business of the board may require. This indicates that they may have meetings at any time to discharge the duty imposed upon them by law, among which is the duty of assessing franchises when no reports are made. Section 4241 imposes a duty upon the sheriff and auditor's agent, but does not interfere with the power of the board to make the assessments as in this case. If they fail to do so, and the sheriff and auditor's agent should attempt to have the assessment made, then the question *would arise* as to their authority to do so. Until such question arises we forbear to express an opinion on it.

"The judgments are affirmed."

From this judgment the ferry company has prosecuted this writ of error, and has assigned the following errors:

ASSIGNMENT OF ERRORS.

"1. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right to consider as part of the property, or as entering into the value of the franchise of the plaintiff in error, its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

"2. The Court of Appeals of Kentucky erred in deciding that the law under which the Board of Valuation and Assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which has been conveyed to it, and which it owned, for operating a ferry from the State of Indiana to the State of Kentucky.

"3. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right, in fixing the value of the capital stock of the plaintiff, or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

"4. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

"5. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the *fourteenth amendment thereof, and did not deprive* the plaintiff in error of its property without due process of law."

ARGUMENT.

It is urged that the value of the franchise to operate a ferry from the State of Indiana to the State of Kentucky should not have been considered in fixing the value of the franchise of the Kentucky corporation.

In the 7th section of the act incorporating the ferry company (see the Act in the Appendix to brief of counsel for plaintiff in error) it is provided:

> "Said corporation may purchase from any existing ferry companies or associations any ferry boats, wharves, and ferry franchises for any ferry or ferries, between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities."

By section 8 of said Act it is also provided:

> "Said corporation may accept such boats and franchises, and wharves and other property in payment of stock subscribed, and at such price as may be agreed upon."

It is admitted that the ferry right on the Indiana shore, by a regular chain of title, passed to certain persons, who operated the ferry and used the ferry privileges as partners; that these parties conveyed their rights to the Kentucky corporation in payment for stock subscribed; that the corporation, in the year 1887, made a contract with the city of Louisville by which it secured a lease of the ferry privileges to operate the ferry and use said privileges so far as the State of Kentucky had legal authority to confer—the right having been vested by law in the said city. In this way the corporation secured control of each ferry right, the one leading from Kentucky to the south bank of the Indiana shore, and the other from Indiana to the north bank of the Kentucky shore, within the city limits.

It is admitted that the Court of *Appeals of Kentucky* in the case of the City of Newport vs. Taylor's Executors, 16 B. M., 700, held that the granting of a ferry franchise across the Ohio river only provided for crossing from the Kentucky shore to a landing in the State upon the other side of the river, and did not authorize a franchise or ferry privilege from such State to the Kentucky shore.

This principle was also announced in the case of Reeves vs. Little, 7 Bush, 470; and the first-named case seems to have

been upheld by this court under the name of Conway vs. Taylor's Executors, 1 Black., 603.

Our contention is that the two rights are now merged or united, forming a legal entity, known as the Louisville and Jeffersonville Ferry Company, incorporated under the laws of Kentucky, and having its situs within her sovereignty. It is not material in fixing the franchise value to determine whether the ferry right originally granted by the State of Indiana is an incorporeal hereditament. The Commonwealth of Kentucky is not seeking to impose any tax upon the tangible property of the company located in Indiana, whether it be realty or personal property. That property has been listed and the taxes paid to the proper collecting officers of Indiana. The tangible property in Kentucky, consisting of the ferry boats and equipments, are listed for taxation with the Assessor of Jefferson county, Kentucky.

It is a tax upon the net earnings of the corporation, now legally authorized to use these ferry rights, which has been ascertained and valued by the board created for that purpose, that the Commonwealth of Kentucky is seeking to recover.

The owners of the ferry right leading from the State of Indiana to the Kentucky shore have transferred that right to the Kentucky corporation, and in return have secured certain shares of its capital stock. As holders of this stock they enjoy the profits of both ferry rights, now united and under one management, having its legal situs in this State. They pay no franchise tax to the State of Indiana. This case is unlike the Henderson Bridge Company, as that corporation had secured charters from both States. The power to operate the bridge under the Kentucky charter extended to low-water mark on the Indiana *side*; *beyond that point the property was* owned and controlled by the Indiana corporation. It necessarily and logically followed, that the franchise value extended no further than the low-water mark on the Indiana shore.

In this case, the ferry right granted by the State of Indiana was owned by *individuals*, who operated the ferry as partners. They voluntarily transferred their ferry privileges to the Kentucky corporation, and are stockholders, sharing in the net

profits arising from its business. It is the value of the franchise contained in its charter which is the subject of taxation. The State of Kentucky, under its tax laws, is not seeking to impose a tax upon the ferry privilege, as such, granted by the State of Indiana, but it is the franchise of the corporation created by Kentucky laws, and having its situs within her jurisdiction, that the Commonwealth of Kentucky claims the right to tax, and thereby compel this corporation to discharge its just proportion of the burdens of taxation in return for protection given and special privileges conferred.

Mr. Justice Field, in delivering the opinion of the Supreme Court in Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 206, said:

> "It is true that property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in McCulloch vs. Maryland (4 Wheaton, 316-329), 'All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.' This proposition may almost be pronounced self-evident."

There is no attempt to tax property having a situs outside of the State, but only to place a just value on the property within its jurisdiction.

II.

It is insisted that this is a tax upon interstate commerce because the *ferry company* operates a ferry, carrying freight and passengers between Louisville, Kentucky, and Jeffersonville, Indiana.

In the dissenting opinion of Mr. Justice White, in the case of Adams Express Co. v. Ohio, 165 U. S., 165, is a full examination of the cases on this point.

In the opinion of the court in the same case, by Mr. Chief Justice Fuller, this language was used, namely:

"The principal contention is that the rule contravenes the commerce clause, because the assessments, while purporting to be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, can not be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of government under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government."

The ownership of these ferry rights is more than a unity of ownership; it is a unity of use for convenience and profit, and from the nature of the business as authorized by the charter. It is not proposed to tax the gross receipts of the ferry company or persons or property transported across the river either way. The corporation has secured a special privilege by its charter, without which it could not have acquired the ownership of the ferry privilege in the State of Indiana. It is only a tax upon the property within the State of Kentucky, and is not an interference with interstate commerce.

III.

It is also assigned as error by plaintiff in error that the franchise of the ferry company and the imposition of this tax is in violation of the fourteenth amendment of the Constitution of the United States.

It is too late to say that these provisions and remedies do not constitute due process of law.

The statutes make provision for statements, notice, hearing, review and correction of errors or excessive valuations. The proceedings are of a judicial nature. The Court of Appeals of Kentucky has sustained the validity of the law and the proceedings, and the decision of the State Court will ordinarily be accepted as controlling the question. (Adams Express Co. vs. Ohio, 166 U. S., 219; Henderson Bridge Company vs. Kentucky, 166 U. S., 153; Hagar vs. Reclamation District, 111 U. S., 710.)

We submit that the judgment of the court below should be affirmed.

CLIFTON J. PRATT,
Attorney General of Kentucky, for Defendant in Error.

D. W. SANDERS,
Of Counsel.

Office Supreme Court U.S.
FILED
DEC 8 1902
JAMES H. McKENNEY,
Clerk.

No. 17.

Sup. Ct. Bk. of Pratt v Sanders for D. C.

Filed Dec. 8, 1902.

Supreme Court of the United States.

Louisville and Jeffersonville Ferry Company,

Plaintiff in Error.

VERSUS

Commonwealth of Kentucky.

Defendant in Error.

IN ERROR TO THE COURT OF APPEALS TO THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

CLIFTON J. PRATT, Attorney General,
D. W. SANDERS,
Attorneys for Defendant in Error.

Supreme Court of the United States.

LOUISVILLE AND JEFFERSONVILLE FERRY CO.
PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF KENTUCKY.
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The tax sought to be recovered by the Commonwealth of Kentucky from the Louisville and Jeffersonville Ferry Company, is a tax on the corporate franchise of the plaintiff in error, measured by its net earnings. Its net earnings, or income, is resorted to simply as a just measure of the tax to be paid for the enjoyment of its corporate franchise.

It has been repeatedly held in the decisions of this Court, that "The privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much legitimate subjects of taxation as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the State." And it has also been decided that "Corporate franchises are legal estates, and not mere naked pow-

ers; but powers coupled with an interest, which vest in the corporation by virtue of their charter."

It has been adjudged by this Court that in the taxation of deposits of savings banks in which there is no capital stock, that investments made by the savings bank in securities of the United States, declared by Congress, in the Act which authorized their issue, to be exempt from taxation by State authority, does not exempt the society from taxation to the extent of the deposit so invested.

Society for Savings v. Coite, 6 Wallace, 595.
Provident Institution v. Massachusetts, 6 Wallace, 611.
Hamilton Co. v. Massachusetts, 6 Wallace, 632.

The subject matter to be taxed is the corporation, and its net earnings within the period named in the taxing statute of Kentucky, are simply the basis of computing the amount.

As was said by Mr. Justice Strong, in State Tax on Railway Gross Receipts, 15. Wallace, 294:

"The tax is laid upon the gross receipts of the "company; laid upon a fund which has become the "property of the company, mingled with its other "property, and possibly expended in improve- "ments or put out at interest. The statute does

"not look beyond the corporation to those who "may have contributed to its treasury. The tax is "not levied, and, indeed, such a tax cannot be, "until the expiration of each half year, and until "the money received from freights and other "sources of income has actually come into the "company's hands. Then it has lost its distinctive "character as freight earned, by having become in- "corporated into the general mass of the com- "pany's property. While it must be conceded "that a tax upon inter-state transportation is in- "valid, there seems to be no stronger reason for "denying the power of a State to tax the fruits of "such transportation, after they have become in- "termingled with the general property of the car- "rier, than there is for denying the power to tax "goods which have been imported, after their orig- "inal packages have been broken, and after they "have been mixed with the mass of personal prop- "erty in the country. Thus, in Brown v. Mary- "land, where it was ruled that a State tax cannot "be levied by the requisition of a license upon im- "porters of foreign goods by the bale or package, "or upon other persons selling the same by the bale "or package, Chief Justice Marshall, considering "the dividing line between the prohibition upon the "States against taxing importers and their general "power to tax persons and property within their "limits, said that 'When the importer has so acted "upon the thing imported that it becomes incor- "porated and mixed up with the mass of property

"in the country, it has perhaps lost its distinctive "character as an import, and has become subject to "the taxing power of the State.' This distinction "in the liabilities of property in its different stages, "has ever since been recognized. It is most impor- "tant to the States that it should be. And yet, if "the States may tax, at pleasure, imported goods "so soon as the importer has broken the original "packages and made the first sale, it is obvious a "tax will obstruct importations quite as much as "would an equal impost upon the unbroken pack- "ages before they had gone into the markets; and "this is so, although no discrimination be made.

"There certainly is a line which separates that "power of the federal government to regulate "commerce among the States, which is exclusive, "from the authority of the States to tax person's "property, business or occupation within their lim- "its. This line is sometimes difficult to define with "distinctness. It is so in the present case; but we "think it may safely be laid down, that the gross "receipts of railroad or canal companies, after they "have reached the treasury of the carriers, al- "though they may have been derived in part from "transportation of freight between the states have "become subject to legitimate taxation. It is not "denied that net earnings of such corporations are "taxable by State authority, without any inquiry "after their source, and it is difficult to state any "well founded distinction between the lawfulness "of a tax upon them and that of a tax upon gross

"receipts, or between the effects they work upon "commerce, except perhaps in degree. They may "both come from the charges made for transport- "ing freight or passengers between the States, or "out of the exactions from the freight itself. Net "earnings are a part of the gross receipts.

"There is another view of this case to which "brief reference may be made. It is not to be "questioned that the States may tax the franchises "of companies created by them, and that the tax "may be proportioned either to the value of the "franchise granted or to the extent of its exercise; "nor is it deniable that gross receipts may be a "measure of approximate value, or, in fact, laid "upon the companies.

"Such a measure imposes no greater burden upon "any freight or business from which the receipts "come than would be an equal tax laid upon the di- "rect valuation of the franchises. In both cases "the necessity for higher charges to meet the ex- "actions is the same.

"Influenced by these considerations, we hold that "the act of the legislature of the State, imposing a "tax upon the plaintiff in error equal to three- "fourths of one per cent. of their gross receipts, is "not invalid, because in conflict with the power of "Congress to regulate commerce among the States. "And under the decision made in Woodruff v. "Parham, it is not invalid, because it lays an import "or duty on imports or exports."

The principle established by the foregoing decis-

ions of this Court, was followed by the Supreme Court of Pennsylvania in Philacelphia Contributions for Insurance v. Commonwealth, 98 Penna. State, 48. In the opinion of that Court, delivered by Judge Sterrett, it is said:

"The interest received by the Company on the "bonds undoutedly fromed a part of its income, and "while the bonds themselves are exempt from taxation, "by virtue of the law under which each class respective-"ly was issued, it does not follow that the same immun-"ity adheres to the money paid from time to time in dis-"charge of the interest due on the securities. When so "paid, it loses the non-taxable characteristic of the bonds "on which it accrues, and should thence-forth be treat-"ed as any other species of income, derived from other "sources. But, as already intimated, the tax is not "laid on the money and other receipts of the company.

"There is an obvious difference between a direct "tax on the property of the corporation and a fran-"chise tax measured by its earnings, which, approxi-"mately, at least, represent either the value of the "franchise granted; or the extent of its exercises.

"This distinction has been repeatedly recognized "by both Federal and State Courts."

This Court, in Home Insurance Company v. New York State, 134 U. S., 594, in an elaborate opinion delivered by Mr. Justice Field, again examined the questions heretofore adjudged by this Court in the authorities above cited, upon a law imposed by the State of New York upon the corporate franchises or business of all corporations incorporated under the law of the state, or of any other state or country, and

doing business within the state, and its value to be ascertained by the extent of dividends declared by the corporation in the current year, and held that the validity of a state tax upon corporations created under the laws of New York, or doing business within its territory, can in no way be dependant upon the mode which the state may deem fit to adopt in fixing the amount for any year, which it will exact for the franchse. The court said:

"By the term 'corporate franchise or business,' as "here used, we understand is meant (not referring "to corporations sole, which are not usually created "for commercial business), the right or privilege given "by the State to two or more persons of being a cor- "poration—that is, of doing business in a corporate "capacity, and not a privilege or franchise, which, "when incorporated, the company may exercise. The "right or privilege to be a corporation, or to do busi- "ness as such body, is one generally deemed of value "to the corporators, or it would not be sought in such "numbers as at present. It is a right or privilege by "which several individuals may unite themselves under "a common name and act as a single person, with a "succession of members, without dissolution or sus- "pension of business, and with a limited individual "liability. The granting of such right or privilege "rests entirely in the discretion of the State and when "granted, it may be accompanied with such condi- "tions as its legislature may judge most befitting to "its interest and policy. It may require, as a condi- "tion of the grant of the franchise, and also of its

"continued exercise of the corporate power, a specific "sum to the State each year, or month, or a specific "portion of its gross receips, or of the profits of its "business; or a sum to be ascertained in any conven- "ient mode it may prescribe. The validity of the tax "can in no way be dependent upon the mode which "the State may deem fit to adopt in fixing the amount "for any year, which it will exact for the franchise. "No constitutional objection lies in the way of the "legislative body prescribing any mode of measure- "ment, to determine the amount it will charge for the "privileges it will bestow. It may well seek, in this "way, to increase its revenue to the extent which it "has been cut off by exemption of such property "from taxation; as its revenues to meet its expenses "are lessened in one direction, it may look to any "other property or source of revenue which is not ex- "empted from taxation. Its action in this matter is "not the subject of judicisl inquiry in a Federal tri- "bunal. As was said in the Delaware Railroad tax "case, 18 Wallace, 206 231, 'The State may impose "a tax upon the corporation as an entity existing un- "der its laws, as well as upon the capital stock of the "corporation, or its separate corporate property; and "and the manner in which its value shall be assessed, "and the rate of taxation, however arbitrary or capric- "ous, are mere matters of legislative discretion. It is "not for us to suggest in any case, that a more equit- "able mode of assessment or rate of taxation might "have been adopted, than the one prescribed by the

"legislature of the State. All else lies beyond our "jurisdiction.'

"It is true, as said by this Court in California v. "Pacific Railroad Company, 127 U. S., 141. that the "taxation of a corporate franchise has no limitation "but the discretion of the taxing power; and its value "is not measured like that of property, but may be "fixed at any sum that the legislature may choose. It "may be arbitrarily laid, without any valuation upon "the franchise. If any hardship or oppression is cre- "ated by the amount exacted, the remedy must be "sought by appeal to the legislature of the state; it "cannot be furnished by Federal tribunals.

"The tax in the present case could not be affected "if the nature of the property in which the whole "capital stock is invested, were changed and put into real property or bonds of New York or of other "States. From the very nature of the tax being laid "upon a franchise given by the State and revokable "at pleasure, it cannot be affected in any way by the "character of the property in which its capital stock "is invested. The power of the State over the cor- "porate franchise and the condition upon which it shall "be exercised is as ample and plenary in the one case "as in the other."

The principle announced in the foregoing cases was followed by the New Jersey Courts in Honduras v. the Board of Assessors, 54 New Jersey Law, 283; S. C. 23 Atlantic, 970, snstaining a tax laid on a franchise of a domestic corporation engaged in foreign commerce. See also,

Rose's Notes on Home Insurance Co.; New Notes of tne U. S. Reports, Vol. II, 957 and 958.
Burroughs on Raxatioe, 168.
Desty on Taxation, Vol. I, 361.
Cooley on Taxation, 135-137.
New York State v. Toberts, 171 U. S., 658.

CLIFTON J. PRRTT,
Attorney-General.
D. W. SANDERS,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 17.—October Term, 1902.

The Commonwealth of Kentucky, Plaintiff, vs. The Louisville and Jeffersonville Ferry Company, Defendant. } In error to the Court of Appeals of the Commonwealth of Kentucky.

[February 23d 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought against the Louisville and Jeffersonville Ferry Company, a corporation of Kentucky, to recover certain taxes alleged to be due that Commonwealth in virtue of the valuation and assessment by the State Board of Valuation and Assessment of the corporate franchise of the defendant company for the year 1894.

Some of the provisions of the Revised Statutes of Kentucky under which that Board proceeded are given in the margin.*

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* "§ 4077. Every railway company, . . and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

"§ 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing following facts, viz: The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real

The company filed an answer, which upon demurrer was adjudged to be insufficient. The defendant declining to answer further, judgment was rendered for the Commonwealth. That judgment was affirmed by the Court of Appeals of Kentucky, and the case is here upon writ of error sued out by the ferry company. The ground of our jurisdiction is that the company claims that, by the judgment of the highest court of Kentucky, affirming the judgment of the court of original jurisdiction, it has been denied rights belonging to it under the Constitution of the United States.

The facts admitted by the demurrer to the answer and therefore, for the purposes of the present hearing, to be taken as true are substantially as follows:

By an act of the General Assembly of Kentucky approved March the 16th 1869, the Louisville and Jeffersonville Ferry Company was created a corporation, with power to carry on the business of ferrying freight, passengers and vehicles over the Ohio River and to purchase ferry boats, wharves and ferry franchises for any ferry or ferries between Louisville, Kentucky, and Jeffersonville, Indiana; and upon the purchase of such franchises to have the right to carry on and conduct a ferry or ferries between those cities. It was also authorized to accept boats, franchises, wharves and other property in payment of stock subscribed and at such prices as might be agreed on.

In the year of 1802 William Henry Harrison, then Governor and commander-in-chief of the Indiana Territory, granted to Marsden G. Clark a license for a ferry at Jeffersonville, Indiana, for the transportation of passengers, carriages, horses and cattle across the Ohio River at that place.

In the same year Governor Harrison granted to one Joseph Bowman a license to keep a ferry from the landing near the spring in the town of Jef-

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value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require.

"§ 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized

fersonville across the Ohio River to the public road at the mouth of Bear Grass Creek in Kentucky.

In 1820 George White, by an act of the Indiana Legislature, was authorized to keep a ferry in the town of Jeffersonville and to ferry off and from any portion of the public ground or commons in that town lying upon or bordering upon the Ohio River across that river to the opposite shore or mouth of Bear Grass Creek—that creek being then as well as now within the corporate limits of Louisville and near the point at which the defendant company now lands its ferry boats in Kentucky.

These three ferry franchises, about the year 1837, vested in A. Wathen, Charles Strader, John Shallcross and James Thompson, and in 1865 came to be owned by John Shallcross, Moses Brown, Hiram Mayberry, James Wathen, A. Wathen, Charles Woolfolk & Co., J. B. Smith, W. C. Hite, E. S. Hoffman, P. Varble and Daniel Park. During all the intervening years ferries had been maintained.

In 1865 the persons then owning the ferry organized as a partnership for the purpose of operating it, and in that capacity continued to operate it until the Louisville and Jeffersonville Ferry Company was incorporated, as above stated. Under its act of incorporation the company procured to be conveyed to itself the above-mentioned ferry franchises with the boats then owned by the partnership, and issued therefor its fully paid capital stock for $200,000. The boats and personal property so acquired were not of great value—the principal value being in the franchises acquired as above set forth.

In 1887 the defendant company made a contract with the Sinking Fund Commissioners of the city of Louisville, a corporation having charge of

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under the laws of any other State or Government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company, or association in this State and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said Board may excuse the officer from answering such questions: *Provided*, That said Board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

certain fiscal affairs of that city, under which the defendant leased the ferry privileges in Louisville, agreeing to pay therefor $800 a year and a wharfage fee annually of $400. That contract by its terms expired January the 1st 1902.

The defendant company states in its answer "that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana."

All tangible property of the defendant company in Kentucky was assessed in the fall of 1893 for the State tax for the year 1894, and that tax was paid. The property so assessed consisted of all the company's boats and other personal property, it having no real estate in Kentucky. For the same year all real estate owned by the defendant in Indiana was assessed by the authorities of that State and the tax thereon paid.

The company had no intangible property except the franchise heretofore described.

"The Board of Valuation and Assessment ascertained what had been the net earnings of the defendant up to September 15th 1893, for the year preceding that date. It then capitalized said net earnings at 6 per cent.—that is, to have been such an amount as at 6 per cent. would produce the sum of $121,050. From this the board deducted $54,164, being the assessed value of the defendant's property in Kentucky and Indiana, leaving the sum of $66,886 as the value of defendant's franchise."

The boats owned by the defendant company when this action was brought and also those owned by it in 1893 "were regularly enrolled, under the laws of the United States, at the port of Louisville and were assessed, as above stated, by the sheriff of Jefferson County, in the fall of that year and the tax paid upon them in the year 1894."

The defendant brought "before the Board of Valuation and Assessment, before that board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained, and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said board making any valuation whatever of its capital stock because all of its property had been once assessed, and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said board refused to enter into the question of the valuation of the said franchise granted by the State of In-

diana, as aforesaid, and owned and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce."

Substantially the whole revenue of the defendant company is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce; that is, from the carriage of persons and property between the States of Indiana and Kentucky. Such was the case presented by the answer.

The ferry company insists that the judgment of the Court of Appeals of Kentucky, affirming the judgment of the court of original jurisdiction, (which sustained the action of the State Board of Valuation and Assessment,) had the effect to deny rights belonging to it under the Constitution of the United States.

It is appropriate here to state the grounds upon which the Court of Appeals of Kentucky proceeded. That court said: "The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897 and 1898. The appellant is a corporation organized under a special act of the Legislature passed in 1869. It purchased a ferry franchise, which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio River from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the Sinking Fund Commissioners of the city of Louisville title to the ferry rights along the Ohio River within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State. . . . The appellant is a Kentucky corporation. The Board of Valuation and Assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the

Ohio River; but under certain sections of the Kentucky statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible or intangible, which it owned in the State of Indiana."

Again: "By virtue of its corporate authority the appellant acquired ferry-boats, the ferry rights, within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio River, and the necessary use of its wharf to carry on that business. It also by contract (which its charter seems to have authorized it to do) acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from Indiana to Kentucky over the Ohio River. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now exists in Kentucky. . . The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. . . There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property. . . The appellant is domiciled in Kentucky and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business income, or revenue, but its income is alone considered in fixing the value of its franchise."

It thus appears from the admitted facts and from the opinion of the court below that the State Board, in its valuation and assessment of the franchise derived by that company from Kentucky, included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the Court of Appeals, the value of the franchise of the ferry company was fixed "as if it conducted all of its business

in the territorial limits of the State of Kentucky," making no deduction for the value of the franchise obtained from Indiana.

The boundary of Kentucky extends only to low-water mark on the western and northwestern banks of the Ohio River. *Henderson Bridge Company* v. *Henderson City*, 173 *U. S.* 592, 609–613, *and authorities there cited.* In that case it was said that although the jurisdiction of that Commonwealth for all the purposes for which any State possesses jurisdiction within its territorial limits was co-extensive with its established boundaries, that jurisdiction was attended by the fundamental condition that it must not be exerted so as to entrench upon the authority of the National Government or to impair any rights secured or protected by the National Constitution.

So that the authority of the ferry company, derived from Kentucky, to transport persons, freight and property across the Ohio River from Kentucky did not invest it with authority to establish and maintain a ferry from the Indiana shore to the Kentucky shore. That is admitted by the counsel for Kentucky. Indeed, in *Newport &c.* v. *Taylor's Ex'rs*, 16 *B. Mon.* 696, 786, the Court of Appeals of Kentucky said that "Kentucky has never claimed the exclusive right of ferriage across the Ohio River except from this shore, and while she has interdicted the establishment of ferries from this side, within a certain distance of an established ferry on this side, she has constantly recognized the right of the authorities on the other side, to establish ferries from that side, without regard to the interdict." The same thought was expressed in *Reaves* v. *Little*, 9 *Bush.* 470. The case of *Newport &c.* v. *Taylor's Ex'or*, was brought to this court, and the judgment of the Court of Appeals of Kentucky was affirmed. *Conway* v. *Taylor's Ex'rs*, 1 *Black*, 603, 631. Referring to the ferry franchise granted by Kentucky, this court there said: "The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those States. It was shown in the argument at bar that similar laws exist in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters."

It must therefore be assumed that the franchise granted by Indiana to maintain the ferry from the Indiana shore is wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways. And each franchise is property entitled to the protection of the law. Kent says that the privilege of establishing a ferry and taking tolls for the use of

the same is a franchise, and that "an estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration." 3 *Kent*, 459. In his Treatise on the American Law of Real Property, Washburn says that the right granted by the legislature, as representing the sovereign power, to carry passengers across streams, or bodies of water, or the arms of the sea, from one point to another, for compensation, is to be deemed a franchise, and belongs to the class of estates called incorporeal hereditaments. 2 *Washburn*, §§ 1212, 1215, 6*th edition*. See also 1 *Cooley's Blackstone*, *Bk. II*, *pp.* 21, 36. In *Conway* v. *Taylor's Ex'r*, above cited, this court approved of Kent's view, and said: "A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property." In Kentucky the right of the widow to have dower assigned to her in a ferry has been recognized. *Stevens* v. *Stevens*, 3 *Dana*, 371.

As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it directly or indirectly? It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

The learned counsel for Kentucky says that it is the value of the company's franchise contained "in its charter" which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the Board of Valuation and Assessment proceeded,

Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. Although now owned by one corporation these are separate franchises.

There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its *situs* in Indiana. While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government. Hence, this court, speaking by Chief Justice Marshall, in *McCullough* v. *Maryland*, 4 *Wheat.* 316, 429, said that, while all subjects over which the sovereign power of a State extends are objects of taxation, "those over which it does not extend, are, upon the soundest principles, exempt from taxation." That proposition, he said, could almost be pronounced self-evident. It was therefore held in *Hays* v. *Pacific Mail S. S. Co.*, 17 *How.* 596, 599, that certain steamers engaged in interstate commerce were not subject to taxation in a State where they might be temporarily when prosecuting their business, but were taxable at their home port, which was their *situs*, and where they belonged, the court saying, "we are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid;" in *St. Louis* v. *Ferry Co.*, 11 *Wall.* 423, 429, 431, that certain ferry boats belonging to an Illinois corporation and plying between East St. Louis, Illinois, and St. Louis, Missouri, were not taxable in the latter State, but at their home port in the former State, the court saying that a tax was void when there was no jurisdiction as to the property taxed; in *Morgan* v. *Parham*, 16 *Wall.* 471, 476, that a vessel engaged in interstate commerce and being from time to time in Mobile while prosecuting its business, was not taxable in Alabama, but was taxable in New York, where it was owned and registered, the court saying that, in its opinion, "the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of the State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value;" and in *Gloucester Ferry Co.* v.

Pennsylvania, 114 *U. S.* 196, 206, that "the property of foreign corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State." In *Cooley on Taxation*, the author, while conceding that the legislative power extends over everything, whether it be person, property, possession, franchise, privilege, occupation or right, says that "persons and property not within the territorial limits of a State cannot be taxed by it;" and that "a State can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another State, than it can subject all the citizens or all the property of such other State to its power." 2*d ed. pp.* 5, 55, 159.

We recognize the difficulty which sometimes exists in particular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.

This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana.

As what has been said is sufficient to dispose of the case, we need not consider the question arising upon the record and urged by counsel, whether the taxation by Kentucky of the ferry company's Indiana franchise to transport persons and property from Indiana to Kentucky is not, by its necessary effect, a burden on interstate commerce forbidden by the Constitution of the United States.

The judgment of the Court of Appeals of Kentucky is reversed and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and Mr. Justice SHIRAS dissent.

	The Louisville and Jeffersonville Ferry Company, Plaintiff in Error,	
18	*vs.*	
	The Commonwealth of Kentucky.	
	Same	
19	*vs.*	
	Same.	
	Same	In error to the Court of Appeals
20	*vs.*	of the State of Kentucky.
	Same.	
	Same	
21	*vs.*	
	Same.	
	Same	
22	*vs.*	
	Same.	

[February 23d 1903.]

Mr. Justice HARLAN delivered the opinion of the Court.

It having been stipulated between the parties that the above cases should abide the decision in No. 17, just decided, the judgment in each case is reversed, and each case is remanded to the State court for such further proceedings as may not be inconsistent with the opinion in No. 17.

Reversed.